

1991

Home Savings and Loan, a Utah corporation v. The Aetna Casualty and Surety Company : Brief in Opposition to Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lynn S. Davies; Russell C. Fericks; Richards, Brandt, Miller & Nelson; Attorneys for Defendant/Appellant; Thomas A. Doyle, Esq.; Baker & McKenzie.

Callister, Duncan & Nebeker; Gary R. Howe; P. Bryan Fishburn; Scott A. Call; Attorneys for Plaintiff/Appellee.

Recommended Citation

Legal Brief, *Home Savings and Loan v. The Aetna Casualty and Surety Company*, No. 910436.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3687

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT, STATE OF UTAH

| | | |
|--------------------------|---|------------------------|
| HOME SAVINGS AND LOAN, a |) | Appeal from Utah Court |
| Utah corporation, |) | of Appeals' Decision |
| |) | Dated August 6, 1991 |
| Plaintiff/Appellee, |) | (Case No. 890101-CA) |
| vs. |) | |
| |) | |
| THE AETNA CASUALTY AND |) | Case No. 910436 |
| SURETY COMPANY, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |
| |) | |

APPENDIX TO APPELLEE'S BRIEF OPPOSING AETNA'S
PETITION FOR WRIT OF CERTIORARI

CALLISTER, DUNCAN & NEBEKER
GARY R. HOWE (#A1552)
P. BRYAN FISHBURN (#A4572)
SCOTT A. CALL (#A0544)
Attorneys for Plaintiff/Appellee
Home Savings & Loan Association
800 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

LYNN S. DAVIES (#A0824)
RUSSELL C. FERICKS (#A3793)
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellant,
The Aetna Casualty & Surety Co.
50 South Main Street
Key Bank Tower, Suite #700
Post Office Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

THOMAS A. DOYLE, ESQ.
BAKER & MCKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312) 861-8866

FILED

NOV 6 1991

CLERK SUP. COURT
UTAH

IN THE SUPREME COURT, STATE OF UTAH

| | | |
|--------------------------|---|------------------------|
| HOME SAVINGS AND LOAN, a |) | Appeal from Utah Court |
| Utah corporation, |) | of Appeals' Decision |
| |) | Dated August 6, 1991 |
| Plaintiff/Appellee, |) | (Case No. 890101-CA) |
| |) | |
| vs. |) | |
| |) | |
| THE AETNA CASUALTY AND |) | Case No. 910436 |
| SURETY COMPANY, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |
| |) | |

**APPENDIX TO APPELLEE'S BRIEF OPPOSING AETNA'S
PETITION FOR WRIT OF CERTIORARI**

CALLISTER, DUNCAN & NEBEKER
GARY R. HOWE (#A1552)
P. BRYAN FISHBURN (#A4572)
SCOTT A. CALL (#A0544)
Attorneys for Plaintiff/Appellee
Home Savings & Loan Association
800 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

LYNN S. DAVIES (#A0824)
RUSSELL C. FERICKS (#A3793)
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellant,
The Aetna Casualty & Surety Co.
50 South Main Street
Key Bank Tower, Suite #700
Post Office Box 2465
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

THOMAS A. DOYLE, ESQ.
BAKER & MCKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312) 861-8866

TABLE OF CONTENTS

| | <u>TAB</u> |
|---|------------|
| Order Granting Plaintiff's Motion for a Court Order Construing the Aetna Bond | 1 |
| Excerpt from Appellee's Brief to Court of Appeals . . . | 2 |
| Harvey Koch, "Overview of Major Developments and Changes During the Last Decade in Financial Institution Bonds," <u>Financial Institution Bond</u> (1989) | 3 |
| Financial Institution Bond, Standard Form No. 24, Revised to January 1986 | 4 |
| Savings and Loan Blanket Bond, Standard Form No. 22, Revised to December, 1982 | 5 |
| Bankers Blanket Bond, Standard Form No. 24, Revised to July, 1980 | 6 |
| Bankers Blanket Bond, Standard Form No. 24, Revised to April, 1969 | 7 |
| Memorandum Decision and Order (July 11, 1984) <u>First Security Bank of Utah v. Aetna Cas. & Surety Co.</u> , D. Utah; Civil No. NC-74-23W | 8 |

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPENDIX TO APPELLEE'S BRIEF OPPOSING AETNA'S PETITION FOR WRIT OF CERTIORARI was mailed, postage prepaid, on this 6 day of November, 1991 to the following:

Lynn S. Davies, Esq.
Russell C. Fericks, Esq.
RICHARDS, BRANDT, MILLER & NELSON
Key Bank Tower, Suite #700
50 South Main Street
Post Office Box 2465
Salt Lake City, Utah 84110 (4 copies)

Thomas A. Doyle, Esq.
BAKER & MCKENZIE
130 East Randolph Drive
Chicago, Illinois 60601 (1 copy)



Tab 1

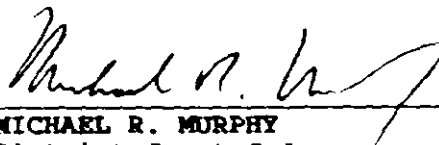
SEP 21 1987

000384

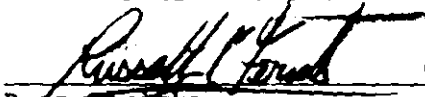
and oral argument submitted by counsel, and good cause appearing, therefore:

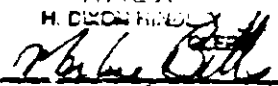
IT IS HEREBY ORDERED that plaintiff's Motion for a Court Order Construing the Aetna Bond is granted. This Court specifically rules that plaintiff sustained a "loss," as the term "loss" is contemplated in the Aetna Bond, on August 14, 1984, ~~and that it discovered said loss only as of that date.~~ ^{discovered the loss sustained} Accordingly, plaintiff ~~both sustained a "loss" and "discovered"~~ ^{that loss} during the period the Aetna Bond was in effect.

DATED: September 21, 1987.


MICHAEL R. MURPHY
District Court Judge

APPROVED AS TO FORM:

 9/11/87
Russ Coricks,
Attorney for Defendant

ATTENT
H. DEON HEDLEY

BY Deputy Clerk

CDN1728F

ORIGINAL FILED IN CASE NO. 87-2

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the
foregoing proposed ORDER GRANTING PLAINTIFF'S MOTION FOR A
COURT ORDER CONSTRUCTING THE AFFIX BOND was hand delivered
this 3rd day of September, 1987, to the following:

Russell C. Pericks, Esq.
RICHARDS, REARDY, MILLER & NELSON
50 South Main Street, Suite 700
Salt Lake City, Utah 84144

Harold J. Pericks

Tab 2

IN THE COURT OF APPEALS OF THE STATE OF UTAH

| | | |
|-------------------------------|---|----------------------|
| HOME SAVINGS AND LOAN, a Utah |) | |
| corporation, |) | |
| |) | |
| Plaintiff/Appellee, |) | Docket No. 890101-CA |
| |) | |
| vs. |) | |
| |) | Priority No. 16 |
| THE AETNA CASUALTY AND SURETY |) | |
| COMPANY, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |

BRIEF OF APPELLEE

Appeal From Rulings and a Final Judgment Entered
in the Third Judicial District Court
Salt Lake County, State of Utah
The Honorable Michael R. Murphy

GARY R. HOWE, ESQ. (A1552)
P. BRYAN FISHBURN, ESQ. (A4572)
SCOTT A. CALL, ESQ. (A0544)
CALLISTER, DUNCAN & NEBEKER
Attorneys for Plaintiff/Appellee
Home Savings & Loan
#800 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

LYNN S. DAVIES, ESQ. (A0824)
RUSSELL C. FERICKS, ESQ. (A3793)
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant/Appellant,
The Aetna Casualty & Surety Co.
Key Bank Tower, Seventh Floor
50 South Main Street
Salt Lake City, Utah 84110
Telephone: (801) 531-1777

STATEMENT OF THE CASE

I. Nature of the Case.

This is an action on a contract of insurance brought by Home Savings & Loan against the Aetna Casualty & Surety Company. By this action, Home seeks indemnification for losses caused by the dishonest conduct of one of its employees, Larry Glad, which it sustained and discovered during the period a Savings & Loan Blanket Bond issued by Aetna was in effect. Home also seeks indemnification for attorneys fees incurred by it in defending the lawsuit which gave rise to the losses it sustained.

Home sustained its losses when the United States District Court for the District of Utah, in Armitage v. Home Savings & Loan, Civil No. C82-0670K (Kane, J.) voided the notes and trust deeds of 36 husband and wife borrowers who had borrowed money from Home to invest in AFCO, a Utah corporate enterprise headed by Grant Affleck. The Armitage jury returned a verdict adverse to Home Savings on August 14, 1984. Based on the verdict, the Armitage Court on February 24, 1986 entered judgment formally voiding the plaintiffs' notes and trust deeds. The principal on the 36 notes voided by the Armitage Court totaled approximately \$1.2 million, which, after certain setoffs ordered by the Court, resulted in a loss to Home of approximately \$998,000. In addition, the Court ordered Home to pay the Armitage plaintiffs \$381,294.62 in attorneys fees and

costs they had incurred, which sum was later compromised in settlement to \$190,647.31.

II. Procedural History and Trial Court Disposition.

Home Savings filed its complaint against Aetna in March, 1986. The case was tried to a jury over a five-week period in October - November 1987, which culminated in the jury, on November 24, 1987, issuing a Special Verdict and responding to certain separate Special Interrogatories. In a series of hearings over the next twelve months, the Court ruled on the effect of the jury's response to special interrogatories and resolved various issues which the parties had reserved for determination by the Court. Judgment was finally entered in favor of Home on November 2, 1988, in the amount of \$1,983,756.12.

In the months preceding trial, Aetna brought several motions seeking dismissal of Home's complaint. The first was a motion to dismiss for failure to join an allegedly indispensable party, F&D of Maryland, which had issued fidelity Bond coverage to Home prior to Home's purchase of the Aetna Bond in June, 1982. Aetna appeals from the denial of that motion. (Aetna Brief, Point VI).

Next, Aetna tried three motions for summary judgment. Aetna argued that it was entitled to judgment as a matter of

law because: (1) its Bond did not indemnify Home's loss because Home, allegedly, had somehow discovered its "loss" before the Aetna Bond went into effect on June 21, 1982 (though the Armitage judgment would not be entered until 3-1/2 years later); (2) its Bond excluded from coverage "any loss resulting directly or indirectly from trading" (Rider 6030a); and (3) Home allegedly failed to mitigate its damages. Aetna appeals the Trial Court's denial of its first and second motions for summary judgment. (Aetna Brief, Points II and IV).

At the same time Aetna moved for summary judgment, Home sought a determination that, consistent with the indemnification language in Aetna's Bond, Home both "sustained" and "discovered" its loss on the AFCO-investor loans during the time period the Aetna Bond was in effect. The Trial Court issued an Order construing the Bond, in which it concluded that Home's "loss" was sustained and discovered when the Armitage Court avoided the AFCO-investors' notes and trust deeds (R. 385). The Order thus established that Home "discovered its 'loss sustained' during the period the Aetna Bond was in effect." The Order, however, left two key factual questions for the jury to decide: (1) "Was Larry Glad's conduct dishonest?" and (2) "If Glad's conduct was dishonest, did it cause Home to sustain its losses on the AFCO-investor loans?"

By the time of trial, Aetna had abandoned its "trading exclusion" defense. (See Pretrial Order, R. 719). Aetna defended on several remaining bases. Principally, it argued: (1) that Home had not proven that Glad was dishonest; (2) that Home's losses were caused not by Larry Glad, but were caused by Home's mismanagement and bad business judgment; (3) that Home had failed to mitigate its losses; (4) that Home had failed to timely notify Aetna of a loss or potential loss caused by dishonesty, in accordance with the Bond's notice provisions; (5) that coverage for loss caused by Glad's dishonest conduct was excluded by Section 11 of its Bond, which terminates coverage for loss caused by an employee who continues in the insured's employment after the insured discovers he is dishonest (Aetna Brief, Point I); and (6) its Bond was void ab initio because Home had either intentionally or unintentionally failed to disclose to Aetna facts and information material to the risk it insured, in connection with the Application Home completed when it purchased the Bond (Aetna Brief, Point III).

At trial, Aetna's "everything including the kitchen sink" defense not infrequently witnessed Aetna arguing intrinsically contradictory positions. Closing argument, for instance, found Aetna defending Larry Glad's integrity and arguing that Home had not proven he was dishonest (R. 2917.150-.180, -.196-.197);

while simultaneously urging that the evidence of Glad's dishonesty was so pervasive that Home should have known better than to have hired him in the first place (R. 2917.213-.215). It found Aetna contending that Glad had been the only one at Home Savings "trying to do the right thing" (R. 2917.152,-.153, -.154); even though it was Aetna which called Ron Carnago, who testified that Glad had earlier embezzled \$60,000 from Sandy State Bank while in its employ (R. 2910.197-.224; Trial Exh. 366), and Sandy State's Clea Rasmussen, who branded Glad "an habitual liar," though a "very" good and "convincing" one. (R. 2923.18).

Because Aetna failed to prove any prejudice, the Trial Court disposed of Aetna's "timely notice" issue in the process of instructing the jury. (R. 2923.218-.220; Instruction no. 35, R. 1337). Aetna has not appealed the Court's ruling on "notice." Aetna has, however, appealed the Court's decision to give certain other instructions, as well as its refusal to give two instructions which Aetna proposed. (Aetna Brief, Point V).

The Trial Court submitted to the jury a Special Verdict. (R. 1347). It also drafted and separately submitted Special Interrogatories, keyed to Aetna's equitable "Bond void ab initio" defense and its "Section 11" defense (R. 1351), the responses to which the Court indicated would be evaluated and "sorted through" following trial. On Thanksgiving eve, 1987,

the jury returned its Special Verdict and answered the Special Interrogatories. The jury, in its Special Verdict, found (1) that Glad's conduct, while in Home's employment, was dishonest and (2) that Glad's dishonest conduct had caused certain of the losses Home had sustained in connection with the AFCO-investor loans. It then found that Home's losses on 34 of the 36 AFCO-investor loans had been caused by Glad's dishonest conduct. It also found that Home had not failed to mitigate its losses.

Responding to Special Interrogatories nos. 1-4, the jury concluded there was no intentional omission or nondisclosure by Home of information material to the risk Aetna had insured, in response to inquiries made by Aetna in the Application for the Bond which Home completed, or otherwise. However, the jury advised the Trial Court that Home had unintentionally failed to disclose material information in response to, and aside from, inquiries made by Aetna in the Application. The jury's answers to the final four interrogatories established that someone at Home had discovered an act of dishonesty by Larry Glad "about mid-December 1981", unrelated to the AFCO-investor loans; and that Home had not known that Glad had engaged in dishonest conduct at other institutions prior to the time Home hired him.

Aetna brought the first in a series of post-trial motions, entitled "motion for judgment notwithstanding the verdict." In

it, Aetna again contended that there was no evidence at trial which established that Glad was dishonest and there was no evidence that Glad's dishonest conduct caused Home's losses. The Court denied Aetna's motion, finding that there was substantial evidence in the record to support the jury's verdict. (R. 1498, 2918.48-.49).

The Trial Court and the parties next proceeded to examine the impact of the jury's special interrogatory responses on the special verdict. In a lengthy Memorandum Decision issued March 4, 1988 (R. 2058), the Court found no evidence in the record to support the jury's conclusion that Home had unintentionally failed to disclose information material to the risk, in response to any inquiries made by Aetna in the Application it asked Home to complete. Accordingly, the Court chose to disregard the jury's answer to interrogatory no. 2. The Court found that evidence existed in the record to support the jury's answer to interrogatory no. 4, but concluded that an insured has no legal duty to volunteer facts or information about which an insurer makes no inquiry. The Court also concluded that the jury's responses to interrogatories nos. 5-8 provided no basis for denying coverage for Home's losses. The Court ruled that judgment would be entered in Home's favor, pending resolution of remaining issues that the parties had reserved for

determination by the Court, which would establish the amount of the judgment.

All but one of the remaining issues were resolved by Minute Entries of April 11 and May 10, 1988 (R. 2212, 2397). Aetna appeals two of the issues resolved by the second Minute Entry: (1) Home's claim for the attorneys fees it paid to the Armitage plaintiffs (Aetna Brief, Point VIII-A); and (2) Aetna's claim, first raised after trial, that Home's "profits" on the AFCO and AFCO-investor loans should be set off against its losses (Aetna Brief, Point VII).

The remaining issue was Home's claim of indemnification for fees and costs it paid to its attorneys in defending the Armitage litigation. Following a short period which the Court allowed for supplemental discovery into "reasonableness" of fees, Home, in October, 1988, moved for partial summary judgment on the fees issue. Home sought the full \$474,170.57 it paid in fees. Rather than contest Home's Motion, Aetna stipulated that the reasonable fees to which Home was entitled were \$437,500.00. Despite its Stipulation to the contrary, Aetna now appeals this issue as well. (Aetna Brief, Point VIII-B).

STATEMENT OF FACTS

I. Home's acquisition of the Aetna Bond.

1. Federal and State regulatory law in effect during the time period of this lawsuit required Home to have in place fidelity loss coverage, in the form of a standard Savings & Loan Blanket Bond. (Shaw, R. 2916.204; Bradshaw, R. 2906.16-.22).

2. From June 21, 1979 to June 21, 1982, Home was protected against loss caused by dishonesty of any of its employees by a Form 22 Savings & Loan Blanket Bond issued by F&D of Maryland. (R. 3414-3432).

3. In mid-May, 1982, Don Bradshaw, in an effort to solicit Home's business, wrote Home and asked if he could quote Home a rate on a Blanket Bond, to be issued by The Aetna Casualty & Surety Co. (Trial Exh. 117; R. 2906.6-.11). Bradshaw was an independent insurance agent with authority to sell insurance on behalf of Aetna, F&D of Maryland, and various other companies. (R. 2906.1-.4). Bradshaw was aware that the F&D Bond's anniversary date was June 21, 1982 (R. 2906.7) and that Home could automatically renew the F&D Bond (R. 2906.23).

4. Bradshaw had authority to write a renewal of the F&D Bond. (R. 2906.11-.12). However, he recommended that Home switch its Bond coverage to Aetna because (1) he thought Aetna's premiums were more competitive and (2) it would spare

him the personal hassle of going through "an agent of record process," required to renew the F&D Bond through him. (R. 2906.12-.14).

5. On June 16, 1982, Home, through Bradshaw, applied for an Aetna Bond, requesting coverage in the amount of \$900,000, the same amount of coverage it had with F&D of Maryland. (Bradshaw, R. 2906.16-.17,-.22; Trial Exh. 118, 122).

6. The Aetna Application form, at Question 17, asked Home to, "List on page 4 all losses sustained by date, type and amount, whether reimbursed or not, during the last six years. If none, so state." Home truthfully answered, "None over deductible amount." (Trial Exh. 122).

7. The Application did not ask for any of the information marshalled by Aetna in its Brief which Aetna now claims should have been disclosed. (Compare Trial Exh. 122 to summary of Robinson and Bradshaw testimony, Aetna Brief, p. 47).

8. During a routine Federal Home Loan Bank Examination begun June 4, 1982, examiners instructed Home to increase its Blanket Bond coverage to \$1.135 million (Bradshaw, R. 2906.18), consistent with government regulatory formulas (Smolka, R. 2919.79-.80; Bradshaw, R. 2906.17). Home forwarded a request for increased coverage to Aetna. (Trial Exh. 334).

9. Aetna was not able to process Home's Application by June 21 (Bradshaw, R. 2906.10), but issued its Bond in July, backdated to June 21, 1982 (R. 2906.14).

II. The Aetna Bond.

10. The Aetna Bond (Trial Exh. 343) was issued effective June 21, 1982, in the face amount of \$1.135 million, for a three year term.

11. The "Preamble" language of Aetna's Bond (p. 2, ¶ 1), which applies to all the Bond's insuring agreements, obligates Aetna to indemnify Home for "loss sustained by [Home] at any time but discovered during the Bond Period."

12. Rider 6041, which replaces Insuring Agreement (A) in the text of the Bond, prescribes fidelity coverage. It provides that Aetna will indemnify, "Loss resulting directly from one or more dishonest or fraudulent acts of an Employee, committed anywhere and whether committed alone or in collusion with others. . . ." "Dishonest or fraudulent acts" is defined as "acts committed by the Employee with the manifest intent: (a) to cause the insured to sustain such loss; and (b) to obtain financial benefit for the Employee, or for any other person or organization intended by the Employee to receive such benefit"

13. General Agreement C provides that Aetna will indemnify Home for court costs and attorneys fees "incurred and paid" in defending any lawsuit in which the claims, "if established against the Insured, would constitute a valid and collectible

loss sustained by the Insured under the terms of this Bond." The costs/attorneys fees indemnity is in addition to the face amount of the Bond. Contrary to Aetna's Fact Statement no. 12 (Aetna Brief, p. 17), the Bond does not specifically exclude fees incurred in defending securities claims.

14. Home's obligation to notify Aetna of a loss or potential loss is governed by Section 4 of the Conditions and Limitations Section of the Bond and by Rider 6091. Rider 6091 amends Section 4 to require that Home notify Aetna of potential losses covered under the Bond, as well as covered losses already sustained. With regard to potential losses, the Bond requires that notice be given "when the Insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond . . . will be sustained."

15. Rider 6030(a) excludes from coverage "loss resulting directly or indirectly from trading."

16. Section 11 (§ 3) of the Bond provides that: "This bond shall be terminated or cancelled as to any Employee-(a) as soon as the Insured shall learn of any dishonest or fraudulent act on the part of such Employee . . ."

17. Aetna, under the terms of the Bond, and pursuant to Home's request, extended coverage under the Bond through August 20, 1986. (Pretrial Order, Stip. Fact no. 21, R. 727).

III. Larry Glad's employment at Home Savings.

18. Prior to working for Home Savings, Larry Glad worked as a loan officer under Bill Cox's supervision at Miller & Viehle, a Salt Lake City based mortgage company. Glad was one of Miller & Viehle's top producers and, during his employment there, earned Cox's confidence. (Cox, R. 2914.60-.65).

19. Cox, by 1981, headed Home's mortgage loan department and managed its 33rd South office. Cox hired Larry Glad as a commissioned loan solicitor. Glad started at Home Savings on June 1, 1981. (Smolka, R. 2921.127,-.130; Cox, 2914.70).

20. On or about December 20, 1981, Bill Cox was told that Larry Glad had taken a fee in addition to his regular commission for arranging a loan. (Pretrial Order, Stip. Fact. no. 6, R. 724). Cox received confirmation of the charge about a week later. (Cox, R. 2914.137).

21. Cox terminated Glad effective December 29, 1981, immediately upon Glad's return from a weeklong Christmas vacation. Independently, Home's management had determined to terminate Glad for reasons unrelated to his taking of a fee. (Smolka, R. 2917.37-.39; Cox, R. 2914.136).

IV. The AFCO and AFCO-investor loans.

22. AFCO was a series of real estate development companies which built, managed, and marketed a number of Utah developments, primarily the Sherwood Hills resort near Logan,

and the Glenmoor Village planned residential community in South Jordan. (Stip. Statement read to jury).

23. Prior to 1982, Grant Affleck, AFCO's President, initiated a massive effort to raise funds for AFCO. His approach usually required an investor to take out a second mortgage loan on his or her home and invest the loan proceeds in AFCO. AFCO would promise to repay the loan together with additional consideration being promised to the investor. Home made such second mortgage loans as did sixteen other Utah-based financial institutions.

24. Home's involvement with AFCO and borrowers who invested in AFCO began in early Fall, 1981, when Larry Glad approached Bill Cox and advised him about a potential referral of \$3 million in second mortgage loans. (Cox, R. 2914.99).

25. In early November, 1981, Glad arranged a meeting between Affleck and Home officers Bradshaw, Smolka, and Cox (Smolka, R. 2921.135-.136). At the meeting, Affleck requested (1) that Home loan \$300,000 directly to AFCO, to be secured by Glenmoor Village condominiums and (2) that Home fund up to \$3 million in second mortgage loans which AFCO would refer. (Smolka, R. 2921.136-.141; Cox, R. 2914.100-.103).

26. Home loaned AFCO \$100,000 on November 10, 1981, based on the strength of the collateral and a positive confirmation

of AFCO's payment history from Deseret Federal. (Smolka, R. 2921.146-.150; Trial Exh. 17). AFCO later repaid its loan.

27. On or about November 10, 1981, Cox, acting on instructions from Fred Smolka, typed up letters committing Home to fund up to \$3 million in second-mortgage loans, which would be referred by AFCO. (Trial Exh. 12; R. 2914.106). The letters contemplated that all referred applications would have to meet certain underwriting standards: among others, that first and second mortgages, together, could not exceed 80% of value; qualified appraisals would be required; and homeowners/borrowers would be personally responsible for repaying loans. (Trial Exh. 11).

28. On November 18, 1981, Home's Board of Directors approved Home's participation in the second-mortgage program; but conditioned participation on (1) Home's securing a commitment in the secondary market to purchase the loans and (2) having each borrower acknowledge that he/she was personally responsible for repaying the loan. (Trial Exh. 39). Wallace Woodbury, Home's counsel, thereafter prepared acknowledgment letters for borrowers to sign. (Trial Exh. 89, 90).

29. From mid-November, 1981 through early January, 1982, Home processed, approved and funded forty-two second-mortgage loans (Pretrial Order, Stipulated Fact no. 4, R. 723).

30. The loans were "processed" by Larry Glad, with the assistance of an AFCO secretary, Valerie Kosta Parker, whom AFCO had made available to help with typing and paperwork on the loan applications referred by AFCO. (Cox, R. 2914.132).

31. Home's underwriter Bill Cox approved each of the forty-two loans Home made, on the mistaken assumption that the credit, income and other information in the loan file was accurate and had been properly verified. (Cox, R. 2906.61-.62, 2905.86). Each loan was also reviewed and approved by MGIC Insurance Co. and either Rocky Mountain Federal or First Federal Savings of Great Falls, two institutions which purchased the second-mortgage loans. (Cox, R. 2905.78).

32. When certain of the second mortgage loans went into default in late February, 1982, Home (1) re-reviewed the loan documentation and verified that each borrower had acknowledged responsibility to repay the loan and (2) interviewed Cox and Elaine Reese concerning the processing and closing of the loans. Home concluded that the notes and trust deeds were enforceable. (Woodbury, R. 2916.221 -.225; Smolka, R. 2919.52-.56; Trial Exh. 111, p. 2).

33. In April, 1982, several hundred persons who had borrowed money from various financial institutions joined to collectively file an action in the recently instituted AFCO bankruptcy proceedings, entitled Alcorn v. Affleck. The Alcorn

Complaint named seventeen financial institutions among its 68 named defendants and set forth numerous causes of actions which allegedly applied across the board to all of the institutions.

34. On July 2, 1982, the above-mentioned borrowers filed essentially the same Complaint in the United States District Court, designated Abbott v. Schaffer, the Bankruptcy Court having concluded it lacked jurisdiction. On or about July 22, 1982, the action was severed as to each financial institution. The severed portion relating to Home was designated Armitage v. Home Savings (C82-0670K). (Pretrial Order Stip. Fact, R. 726). Plaintiffs included 36 of the 42 couples who had borrowed from Home to invest in AFCO. Discovery in Armitage began in earnest in the Fall of 1982.

35. On August 14, 1984, the Armitage jury returned a Special Verdict against Home, which found Home liable on five of the over twenty theories Plaintiffs pursued. (Pretrial Order, Stip. Fact. no. 20, R. 727).

36. On February 24, 1986, the Court entered judgment in the Armitage case, formally voiding the Plaintiffs' notes and trust deeds. (Pretrial Order, Stip. Fact. nos. 22, 23, R. 727).

37. The Court also, on March 21, 1986, ordered that Home pay the Armitage Plaintiffs their attorneys fees, in the amount of \$381,294.62. After negotiating a reduction, Home paid \$190,647.31.

V. Glad's dishonest conduct.

The evidence of Glad's dishonesty, in connection with his introduction of AFCO to Home and his role in the processing and closing of second mortgage loans, included the following:

38. In the Fall of 1981, AFCO, unknown to Home Savings, was in extreme financial difficulty. (Broadbent, R. 2906.151; Westergard, R. 2910.18-.71). Affleck told Bob Mitchell, brother of his secretary Cindy Mitchell (Broadbent) that AFCO desperately needed additional money; that he would pay a handsome fee to anyone who could arrange for additional funds; and that he didn't care how the money was obtained. (Mitchell, R. 2914.14-.15).

39. Bob Mitchell, two days later, introduced Affleck to Larry Glad at a meeting in Glad's office at Home Savings. (Mitchell, R. 2914.16). Mitchell believed that Glad might be willing to help because (1) Glad had been more than willing to alter information on his sister's loan application (inflated income, lengthened time of employment) to enable her to qualify for credit, (Mitchell, R. 2914.13-.14; Broadbent, R. 2906.154); and (2) Glad, unknown to Home, had diverted to his personal use a \$14,000 loan commitment payment made to Home by Mitchell's company, IVEL Construction. Glad admitted to Mitchell he had used the \$14,000 to purchase cocaine. (Mitchell, R. 2914.10-.13).

40. After the initial meeting with Affleck, Glad told Mitchell, "I've got him. He is in a sinking ship. There is nobody else in town that will touch him on financing, and I can put these together for him." Glad added, "I'll make a fortune off it." (Mitchell, R. 2914.19). In a follow-up meeting about mid to late October at Gino's, a restaurant next door to Home Savings, Cindy Mitchell testified that Glad told Affleck he could do loans referred by AFCO "if the price was right." (Broadbent, R. 2906.154).

41. Glad assured Affleck that Home could process \$3.1 or \$3.3 million in loans, provided that AFCO pay a 1% origination fee directly to Mitchell out of the initial loan to AFCO. (Broadbent, R. 2906.155-.156). Glad, without Home's knowledge, had Affleck sign a document authorizing a \$31,000 fee to Mitchell (Trial Exh. 1, 2). Glad proposed to Mitchell that Mitchell keep \$14,000 as repayment for the diverted money; and that he, unknown to Home, would keep the rest. (Mitchell, R. 2914.21).

42. Prior to making the \$100,000 loan to AFCO, Glad obtained credit reports on AFCO, Affleck, and Carvel Shaffer, each which contained adverse credit information. (Trial Exh. 13, 14, 15). Glad withheld the negative reports from his supervisors, who never saw them. (Smolka, R. 2919.19-.21; Cox, R. 2914.111).

43. On November 10, Glad arranged to close the AFCO loan himself (Smolka, R. 2919.24), in place of Elaine Reese, Home's regular "loan closer," who was absent from work that day (Cox, R. 2914.108-.110). When Cox asked Glad to show him the closing statement, the penciled-in statement Glad showed to Cox did not list the \$31,000 disbursement to Bob Mitchell, though the typed statement, which AFCO signed, did show the fee. (Trial Exh. 17, p.2). Glad caused Home to issue a check to Mitchell for \$31,000 (Trial Exh. 320), which Mitchell then split with Glad.

44. Many of the second-mortgage loan applications AFCO referred to Home had been rejected by other institutions. (Parker, R. 2913.21). When Cindy Mitchell volunteered this negative information to Glad he responded that that would be no problem. (Broadbent, R. 2906.158).

45. Cox instructed Glad to call each of the borrowers who had previously submitted loan applications to AFCO, and confirm (1) that they were still interested in borrowing against the equity in their homes and (2) that the information in their application was still accurate. Two days later Glad gave a list of names to Cox (Trial Exh. 71), whom he said he had called. (Cox, R. 2914.115-.116). Borrowers whose names were on Glad's list testified that Glad had never called them. (E.g. Devey, R. 2911.144).

46. Parker, whom Affleck had made available to Home to assist in processing the second mortgage loans, testified that Affleck "told me to go to Home Savings and do what Larry Glad wanted me to do. Get those loans through and hurry it up." (R. 2913.21). After she had helped at Home for about a week, Glad ordered her to alter data on a loan application. (Parker, R. 2913.30). Parker, troubled about the incident, complained to Affleck. "He [Affleck] told me to do exactly what Larry Glad wanted me to do." (R. 2913.30-.31).

47. Once, when Parker protested Glad's instruction that she forge a signature, Glad became irritated and said, "Its very simple, Valerie. You just take it and you just do like this," and he signed the person's name. Then he added, "Now, I don't want to have to do this. I want you to just take care of it from here on out." (Parker, R. 2913.35-.36).

48. As it became evident that certain borrowers AFCO had referred could not otherwise qualify for loans, Glad ordered that employment dates, income levels, debts, etc. be altered to ensure that borrowers would qualify. (Broadbent, R. 2906.160-.161; Parker, R. 2913.32-.33; Phippen, R. 2905.210). Signatures of borrowers on applications and employers on employment verifications were forged. (Parker, R. 2913.30,-.34; Cassul, R. 2920.84-.86; F.W. Witt, R. 2905.144,-.148; Pehrson, R. 2905.192,-.194; Rosenloff,

R. 2905.264; Sadler, R. 2910.101). Other alterations included fabrication of letters to explain away negative credit reports (Sadler, R. 2910.101); invention of fictitious savings accounts (F.W. Witt, R. 2905.15); inflation of the value of borrowers' assets (Phippen, R. 2905.209); and, as Mrs. Richards testified, "Our ages were [lowered] to 50 years, bless them." (R. 2905.247).

49. Loan documents were backdated by Elaine Reese to circumvent the borrowers' three day right of rescission, to allow immediate disbursement of funds to AFCO, on Glad's false assurance to Reese that Cox had ordered and approved backdating of all the loans. (Reese, R. 2918.111-.113).

50. With Glad's knowledge, Parker notarized trust deeds and other documents, though she had not been present when they were signed. (Parker, R. 2913.51-.53).

51. Following the November 18 Board Meeting (referred to in ¶ 28 above), Cox instructed Glad and Reese that one or the other of them was to personally close all subsequent loans. (Cox, R. 2905.62). Contrary to Cox's express instruction, Glad gave loan files to Affleck to close. (Broadbent, R. 2906.180; Smolka, R. 2919.17). Affleck told borrowers that AFCO would make their loan payments for them. He showed borrowers where to sign, explained none of the documents, and let none of the borrowers read them. Virtually every borrower testified that

had a Home employee been present to explain the documents they were asked to sign, that they would not have signed the documents. (Mrs. Witt, R. 2905.172; Gleed, R. 2905.184; Pehrson, R. 2905.200; O.T. Farnsworth, R. 2905.228; O.F. Farnsworth, R. 2905.235; Richards, R. 2905.243; Chandler, R. 2905.257; Rosenloff, R. 2905.263; Scoville, R. 2911.18).

52. Contrary to Aetna's assertion throughout its Brief that Home had discovered Glad's dishonesty vis-a-vis the AFCO-investor loans prior to June 21, 1982, the evidence in the record indicates that Home did not discover Glad's dishonest activity in connection with the AFCO-investor loans until discovery was underway in Armitage, in October-December, 1982. (Smolka, R. 2917.22-.26,.40-.41, -.46, 2919.24-.25,.52-.53,-.56, -.75-.78, 2920.59; Woodbury, R. 2916.223-.227; Cox, R. 2905.86; Trial Exh. 111, p. 2).

53. Aetna's assertion that the Federal Home Loan Bank's Report of Examination, under date of June 4, 1982, was "complete" as of that date and that "Home Savings had immediate access to that report" (see Aetna Brief, Fact Statement B-2-m), is in error. June 4, 1982 was when the federal examiners began their examination at Home Savings; Home did not receive a copy of the report until approximately September, well after Aetna's Bond was in place. (H. Bradshaw, R. 2907.155-.159; R. Greenwood, R. 2916.195; E. Weis, R.

2909.152). Also, contrary to Aetna's Fact Statement no. 2-n, the examiner who wrote the report did not conclude that Home's "management," apart from the conduct of its employees, had subjected Home to possible losses. (Greenwood, R. 2916.185).

54. When it completed the Application for the Aetna Bond, Home had no idea that it might one day sustain a loss on the AFCO-investor loans, that would later give rise to a fidelity claim against Aetna's Bond. (Smolka, R. 2917.40-.41,-.46).

VI. Glad's use of cocaine.

55. Following his departure from Miller & Viehle and prior to his employment at Home Savings, Glad had begun using cocaine in significant quantities. (Wolfe (Glad's first wife), R. 2918.208,-.210-.228); Rasmussen, R. 2923.23).

56. Bob Mitchell testified that in the October-December, 1981 time frame he observed Glad on numerous occasions using cocaine (R. 2914.29 -.27,.46) and estimated that Glad's habit cost \$300-\$500 a day (R. 2914.37).

57. Dr. Gary Jorgensen, whose specialty is treatment of drug addicts, indicated that a \$300 to \$500 a day habit would categorize Glad as a heavy user, who would be willing to steal and deceive in order to obtain the money he needed to support his habit. (R. 2907.35-.37).

VII. Home's interaction with Aetna.

58. Based on information it had discovered during the course of depositions in Armitage, Home notified Aetna in December, 1982, that the plaintiffs' claims might give rise to a covered loss under the Bond. (Smolka, R. 2919.75.-78; Trial Exh. 119, 120).

59. In early 1983, Aetna hired a Salt Lake City law firm (Sutiter, Axland) to monitor the Armitage litigation, to review pleadings, sit in on depositions, etc. (Pretrial Order, R. 726).

60. On September 30, 1983, Aetna advised Home in writing that the pleadings it had reviewed (the same ones Aetna highlights in its Brief) did not set forth any claims that would be covered under its Bond and declined to defend Home. (Trial Exh. 140).

61. Aetna has retained the premiums paid by Home to purchase its Bond and at no time, during the pendency of the Armitage or this litigation, ever tendered the premiums back to Home. (R. 2918.85-.86).

62. Home sustained a net principal loss in the amount of \$998,623 on its second mortgage loans when the Armitage Court, on February 24, 1986 entered judgment avoiding the plaintiffs' notes and trust deeds. See Aetna Fact Statement no. 16 (Aetna Brief, p. 18). In the present action, Home requests that Aetna indemnify it for this loss, pursuant to the terms of its Bond.

Tab 3

Overview of Major Developments and Changes During The Last Decade In Financial Institution Bonds

by Harvey C. Koch

I. INTRODUCTION

This 1989 National Institute on Financial Institution Bonds has been specifically designed to provide an in-depth treatment to the 1969 and 1980 Bankers Blanket Bonds and the 1986 Financial Institution Bond Form 24. Every aspect of Financial Institution bond coverages has been exhaustively dealt with in this volume by this Institute's seventeen member faculty, with special attention being directed to an examination of the significance of the Aggregate Liability of Underwriter provision, the Consideration Clause, and the changes to and new features of Insuring Agreements (A), (B), (C), (D), (E) and (F). Extensive review of the substantial changes that have been made to General Agreements (D) and (F), as well as to the new and revised definitions and exclusions has also been addressed by this Institute.

This volume constitutes the latest contribution of the Fidelity and Surety Committee of the American Bar Association to the reference materials prepared over the years by that Committee for all bankers, savings and loan officers, senior members of brokerage and insurance companies, and the attorneys who represent them, as pointed out by James A. Black, Jr. in his introduction to this volume.

The other two major reference works on Financial Institution Bonds available from the American Bar Association are the Annotated Bankers Blanket Bond and the Financial Institution Bond Litigation Manual. The Annotated Bankers Blanket Bond was first published by the American Bar Association in 1980. A First Supplement was published in 1983, and a Second Supplement was published in 1988. The Annotated Bankers Blanket Bond, as supplemented, originated from the American Bar Association National Institutes on Bankers and Other Blanket Bonds, also referred to in James A. Black, Jr.'s introduction. The annotations are exhaustive concerning cases decided under the Bankers Blanket Bond, Form 24 1969 Edition. The First Supplement follows the format of the original Annotated Bankers Blanket Bond, except that each section in the First Supplement begins with the relevant language from the 1980 Revision to Form 24. Also, a new section was added annotating the trading loss exclusion. The Second Supplement followed the format of the original Annotated Bankers Blanket Bond and the First Supplement, except that each section in the Second Supplement begins with the relevant language from the 1986 revision to Form 24.

The Financial Institution Bond Litigation Manual on the other hand, is based on a hypothetical fact situation tailor-made to highlight financial institution bond litigation trends as demonstrated by reported decisions in the recent past and as reasonably foreseeable by virtue of the major revisions to the bond between 1969 and 1986. The Litigation Manual is divided into four parts (corresponding to the four litigants in the hypothetical law suit: The Bank, The Financial Institution, The Bank Directors and Principal Officers, and The Bank Directors and Officers' Liability Insurer and specifical-

ly discusses developing litigation trends inherent in (1) the rights of banks to recover against insurers as well as officers and directors, (2) defenses and remedies of the Financial Institution Bond surety, (3) defending bank officers and directors against claims of dishonesty and fraud, and (4) the defenses and remedies of the bank directors and officers liability insurer. The Litigation Manual, therefore, serves a very specific purpose for litigators, and is a valuable tool to be used in connection with the Annotated Bankers Blanket Bond.

This volume completes the trilogy by making available what is virtually a current text book, divided into eighteen chapters, on Financial Institution Bonds. This volume then will constitute a master reference work for the Financial Institution Bond, complemented by the Annotated Bankers Blanket Bond, as supplemented, and the Financial Institution Bond Litigation Manual.

As the title suggests, the intent of this paper is to provide an overview of significant changes to, and developments, in and out of the courts, regarding Financial Institution Bonds during the ten year time frame preceeding 1989, the year of this National Institute. In pursuit of that theme, we now turn to the subject of changes, which will be followed by a section addressing developments.

II. CHANGES TO FINANCIAL INSTITUTION BONDS DURING THE LAST TEN YEARS

A. Bankers Blanket Bond, Standard Form No. 24 (Revised July, 1980)

As Robin Weldy points out in excellent detail in his chapter on History of the Bankers Blanket Bond and the Financial Institution Bond, the 1969 version of the Bankers Blanket Bond, Standard Form No. 24 was revised in July of 1980, by the Surety Association of America, in collaboration with the American Bankers Association.

For purposes of this overview, significant was the Declarations Page modification allowing the insertion of the Deductible Amount in Item 3. This change made unnecessary certain deductible riders which were at the time of the change being provided with the 1969 version of the bond upon its issuance. Also language dealing with Insuring Agreements (D) and (E) and Misplacement Coverage were included in the Declarations Page.

One of the more significant achievements of the 1980 version was that it incorporated within its four corners fourteen different riders from SR-6019, defining dishonesty and exclusions, all the way through SR-6059 regarding "Effective Time Rider".

Insuring Agreement (A) addressed dishonest or fraudulent acts of employees, and constituted the incorporation of Rider SR-6019, which was originally promulgated in April, 1976, and which is discussed in more detail below.

Insuring Agreements (B), (C), (D), (E), and (F) were all modified, rewritten, or shortened.

Although General Agreements (A) and (D) were unchanged, General Agreements (B), (C), (E), and (F) all constituted changes, or additions to the bond.

Revised or new definitions included definitions for "employee", "forgery", and "property".

In addition, seven exclusions were incorporated into the 1980 bond revision.

B. Financial Institution Bond, Standard Form No. 24 (Revised January, 1986)

As noted in the 1986 Statement of Change, which is the first of four appendices to this volume, the Surety Association of America, after discussion with the American Bankers Association, revised the Bankers Blanket Bond, Standard Form No. 24 to January, 1986. As Robin Weldy points out in his contribution to this volume, the changing of the name of the bond from Bankers Blanket Bond to Financial Institution Bond was for a good reason. In fact, several courts had perceived the term "Blanket" as indicating that the bond was a contract to be given the broadest interpretation, notwithstanding the very specific contractual provisions contained within the four corners of the bond. Important for overview purposes is the point that the contract known as the Bankers Blanket Bond prior to 1986 is conceptually the same as the Financial Institution Bond appearing on the scene in 1986.

One of the more important features of the Financial Institution Bond is the limitation of the liability of the underwriter over the life of the bond to a predetermined dollar amount. Therefore, the bond is automatically cancelled when the exhaustion of the Aggregate Limit of the bond has occurred by the payment by the underwriter of various claims made against the bond during the bond period.

Given the trend of the courts in the 1970's and early 1980's, the amendment of the Consideration Clause to establish that the underwriter has issued the bond in reliance on the statements and information supplied by the insured in the bond application is significant indeed.

Another significant change is that in the words of Robin Weldy, "Those bonds previously written on a 'loss sustained' basis have been converted to a 'discovery' basis".

One should also be alert to the changes made in the Insuring Agreements, the General Agreements, Conditions and Limitations, together with a total of eleven changes in the Exclusion section of the bond.

Returning to the subject of "discovery" for a moment, it is impossible to overemphasize the significance of new language in Section III to the effect that discovery occurs when the insured discovers the loss, regardless of when the acts which caused the loss might have occurred.

Now that we have an overview of the changes to the bond made in 1980 and 1986, and how they relate to one another and the 1969 version, we now turn to what are considered to have been major developments regarding Financial Institutions and Financial Institution Bonds over the last ten years.

III. MAJOR DEVELOPMENTS

Whereas this volume deals primarily with the Financial Institution Bond and the law interpreting its various versions, any overview of major developments during the last ten years must include a reference to developments within the Financial Institution industry itself during that time period.

A. Trends in the Financial Institution Bond Industry

Although since 1982 this Country has been experiencing one of the longest booms in the recent past, during that same period the United States Government, acting through the Federal Deposit Insurance Corporation (FDIC) and the Federal Savings & Loan Insurance Corporation (FSLIC), has had to rescue the deposits of many millions of Americans from over 600 commercial bank failures and forced mergers and well over 100 failed savings and loan associations which underwent liquidation, with hundreds of others being officially insolvent.

Obviously this trend has brought enormous economic pressures to bear, and the Financial Institution Bond has felt its fair share of that pressure. Because such massive amounts of money have been lost in the process, the entire insurance industry has shared in the effects of such pressures. The approval of the courts of this country over the last ten years of advanced theories of bad faith, the doctrine of reasonable expectations, and similar weapons against insurers is more easily understood, even though not accepted as an appropriate legal reaction to such immense pressures. Part of the same trend, and perhaps explainable on the same grounds, is the increased finding by the courts of ambiguities in bonds and other insurance contracts, requiring construction against the insurer. A more finite manifestation of this trend is the line of cases approving astronomically high punitive damages against insurers for failure to promptly pay relatively small claims. Losses to insurance companies caused by such trends certainly have played a hand in the diminution of the number of Surety Association members still writing Financial Institution fidelity bonds. Such trends are well addressed by changes in the underlying contract. Thus the advent of the 1980 and 1986 revisions to the Financial Institution Bond.

Another trend resulting from such pressures is seen in the decision by the FSLIC to institute suit against attorneys who advised failed savings and loan and thrift institutions. In fact, the March 16, 1989 edition of the Wall Street Journal reported on suits filed in San Francisco, Philadelphia, Dallas, and Metairie, Louisiana for amounts far beyond the attorneys' malpractice insurance limits. Likewise, outside accountants who audited such institutions are also being sued.

B. Third Party Suits Against Banks For Fraud By a Bank Employee

One of the major changes in the 1980 Form 24 (and continued in the 1986 form) was the replacement in Insuring Agreement (A), (B), (D) and (E) of "loss through" by "loss resulting directly from." The intent was to replace the vague "through" with language which would translate to proximate cause.

This was mostly successful in Agreements (B), (D) and (E). (See: the papers of James Crowder, Tom Connally and Peter Haley.) It should have also been successful for Insuring Agreement (A) because such employee fraud of a third party would involve a loss to the insured bank only if the third party obtains a judgment against it. This would be an indirect rather than a direct loss. However, some courts have held that there is no substantial difference between "through" and "resulting directly from" so that since the third party judgment against the insured came "through" the employee fraud, it was covered by the bond. See French American Banking Corp. v. Flota Mercante Gancolombiana, S.A., 609 F.Supp. 1352 (S.D. N.Y. 1985).

In addition to the "loss resulting directly from" concept, the 1980 and 1986 bonds' Insuring Agreement (A) incorporated the 1976 rider requirement of "manifest intent" to cause the insured a loss. For an example of courts following the clear meaning of "directly resulting from" and "manifest intent" to bring total clarity to the contract, see Hartford Acc. & Ind. Ins. Co. v. Washington National Ins. Co., 638 F.Supp. 78 (N.D. Ill. 1986); Commercial Bank of Bluefield v. St. Paul Fire & Marine Ins. Co., 336 S.E.2d 553 (W.V. 1985). As has been pointed out by others writing this volume, the bond is not intended to cover a loss to the bank resulting from a judgment obtained against it by a third party arising out the dishonesty of a bank's employee. Neither is the fidelity bond intended to cover losses resulting from the dishonesty of the bank itself. Nevertheless, bonds have been construed to cover both types of losses.

Certainly these are significant developments.

C. Withdrawal of Savings & Loan Bond Form 22

Another important development was the Surety Association of America's decision to no longer issue bond Form 22 to Savings and Loan Associations. Instead the new Financial Institution Bond Form 24 is used with SR 6157 attached.

Form 22, particularly that part of its Section 12 termination provisions which applies to an FSLIC takeover, has recently been the subject of litigation in California and Louisiana. These cases (Continental Ins. Co. v. FSLIC and Sharp v. FSLIC) are discussed in full detail in Section III of David Bordon's paper, pages 26-32. Since that paper was completed, the Fifth Circuit in Sharp v. Fed. Sav. & Loan Ins. Corp., 858 F.2d 1042 (5th Cir. 1988) affirmed the trial court, holding that: "...the plain language of the bond unambiguously points to the conclusion that the bond terminated immediately upon the commencement of the conservatorship." (At page 1046). On January 17, 1989 the Fifth Circuit denied FSLIC's petition for an en banc rehearing.

Of particular interest is the court's response to FSLIC's argument that ambiguities in insurance contracts are to be construed strictly against the underwriter. The Court said:

"This principle does not apply in this case for two reasons. First and foremost, we have already demonstrated that this contract is not ambiguous, and therefore even giving the contract a strict construction we would reach the same result...(T)his rule is an extension of the general rule that a contract is construed strictly against the party who drafted it, and that where, by contrast, the contract was in fact a joint effort of both insurers and the insureds, the principle need not apply." (At page 1046).

"Form 22...was a product of such a joint effort. Indeed, FSLIC, which in this case has stepped into the shoes of the insured is the very institution which required that Underwriters issue their coverage under Form 22 in the first place. Therefore, even if the language were ambiguous, there would be no reason to weigh our construction heavily in favor of coverage." (At page 1046).

The doctrine of contra proferentem has already been rejected as to Form 24. The Fifth Circuit recognized the joint drafting of that bond in Calcasieu-Marine Nat'l Bank v. American Employers' Ins. Co., 533 F.2d 290, 296 (5th Cir. 1974): "...the banker's blanket bond being construed was drafted by a joint effort of the American Bankers' Association and the American Surety Association."

As to the ambiguity, the first paragraph of Section 12 of the 1986 Financial Institution Bond Form 24 is identical to the first paragraph of Section 12 of the savings and loan Form 22 bond. Thus, the court's finding in Sharp, would apply to Form 24. In addition, rider SR 6157, Paragraph 5 reads:

5. The following is added as the final paragraph of Section 12:

If the insured is an institution insured by the Federal Savings and Loan Insurance Corporation, termination or cancellation of this bond in its entirety, whether by the Insured or the Underwriter, as provided in parts (a) and (b) in the first paragraph of Section 12, shall not take effect prior to the expiration of ten days from the receipt by the Federal Home Loan Bank of which the Insured is a member of written notice of such termination or cancellation unless an earlier date of termination is approved by said Federal Home Bank.

Termination of this bond as provided under the terms of parts (c), (d), (e) and (f) is automatic. The Underwriter shall be under no obligation to give prior notice of such termination.

Since part (c) is the Federal takeover provisions, this amendment stated that bond termination is automatic, with no notice required of the Underwriter, in the situation at issue in Sharp. The new form for savings and loan institutions, therefore, is even clearer on that point than was the Form 22.

D. Possible Increased Use of Riders on Financial Institution Bonds

Another important and interesting development deals with the use of riders on Financial Institution Bonds.

In analyzing Royal Trust Bank v. Nat'l Union Fire Ins. Co., 788 F.2d 719 (11th Cir. 1986), the only case construing the new bond's definition of discovery, Duncan Clore's paper reports the court's handling of Rider 7 to the bond. See Clore, pages 20-24.

This rider excluded any liability arising out of circumstances or occurrences "known" to the insured and not disclosed to the underwriters prior to the inception of the bond. The bank attempted to differentiate the bond's definition from the rider because the definition uses the term "aware" instead of "known." However, the court held that since the bond applies only to losses discovered during the bond period, losses discovered before the bond period are presumptively not covered. Thus, the Court said, "Rider 7 merely reiterates this presumption more explicitly..."

It seems to me that if riders can make other provisions of a bond more explicit without raising an ambiguity then they can be used to counteract ambiguities found by the courts. In addition, they can be used to avoid adverse decisions resulting from courts rationalizing or simply ignoring bond language. And, since the new financial institution bonds will be issued for only a one-year period, these curative riders can be put "on stream" relatively quickly.

Such usage could be a wave of the future.

E. Notice and The Requirement of Insurer Prejudice

Another development during the 80's which has adversely affected fidelity bonds is the departure by some courts from the traditional view that an insured must comply strictly with the notice requirements of the bond. Those courts now require the insurer to show not only that the notice was untimely but also that the insurer was prejudiced thereby.

In the March 1989 Newsletter of the International Association of Defense Counsel, Paul Devin analyzes this "recent trend". He points out that it probably springs from a consumer protectionist approach to construing insurance contracts. See: Keeton & Widiss, Insurance Law § 7.2(b), and statutes such as Massachusetts, General Laws Chapter 175, § 112, enacted in 1975.

This approach has a certain appeal when applied to a liability insurance policy, as to which the insured has no input into the language or terms of the policy and does not understand them. But the rationale should not be applied to a fidelity bond because:

First, the fidelity bond is an arms-length, negotiated contract between sophisticated business entities, the standard form for which was drafted by the joint efforts of the Surety Association of American and the American Bankers Association.

Second, strict compliance with notice requirements is more important to a fidelity bond than to a liability insurance policy. Loss under a liability insurance policy is usually the

result of a single event and is therefore non-recurring. Loss under a fidelity bond often results from a course of conduct which, if not promptly investigated, will continue to generate further losses.

Third, where notice under the bond is delayed the insurer cannot promptly investigate and may pay non-covered claims. Because the prejudice requirement allows and may even encourage insureds to delay notice, the payment of some non-covered claims could become the rule rather than the exception. If that happens, insureds as a class will have to bear those economic costs through increased premiums.

IV. CONCLUSION

The primary purpose of this paper has been to provide an overview of major developments and changes during the last decade in Financial Institution Bonds. What this overview has shown, above all, is that the Financial Institution Bond is, after all, a contract subject to interpretation by the courts. As in other areas of contract law, as the courts interpret contracts, contracting parties generally react to those interpretations by fine tuning the genre of contract involved. That is certainly the case with the Financial Institution Bond. As we have seen, the definition of dishonesty introduced in the 1976 rider, which was incorporated in the body of the 1980 revision to the bond, was expressly drafted in order to finally put to rest the perplexing question of what in fact is dishonesty in the context of the Financial Institution Bond. That is one example of such fine tuning.

Another example of fine tuning of contracts is seen again in the 1986 revision of the bond, which as pointed out above, brought additional definitions, and guidelines for determining the various issues that arise between the surety and the various other parties involved, as more graphically demonstrated in the Financial Institution Bond Litigation Manual published by the ABA in 1988, and referred to in more detail in the introduction to this paper.

As has been pointed out, controversy still rages over certain provisions of the bond, including the provisions of Section 12 which gave rise to the Sharp v. FSLIC litigation. And even though the United States Fifth Circuit was quite clear in its decision, all indications are that the central issue involved is not necessarily resolved, and may even be addressed by legislation soon to be considered by the United States Congress which might well serve to unsettle the very sound result of the very legally sound holding of the Sharp decision.

Whereas the purpose of this paper has been to highlight changes, trends, and developments, a careful and close reading of each and every one of the papers making up this volume is indispensable to a thorough and complete understanding of the issues involved and the manner in which the courts have dealt with those issues.

The law of financial institution bonds is one of the most challenging and stimulating areas of contract law, and given the crisis in the banking and savings and loan fields

today, those challenges and complexities can only be expected to increase in substantial measure.

Tab 4

| |
|---|
| <p style="text-align: center;">FINANCIAL INSTITUTION BOND Standard Form No. 24, Revised to January 1986</p> <p style="text-align: center;">Bond No.</p> <p style="text-align: center;">(Herein called Company)</p> <p>DECLARATIONS</p> <p>Item 1. Name of Insured (herein called Insured)</p> <p>Principal Address:</p> |
|---|

Item 2. Bond Period: 12:01 a.m. on _____ to 12:01 a.m. on _____
(MONTH, DAY, YEAR) (MONTH, DAY, YEAR)

Item 3: The Aggregate Liability of the Underwriter during the Bond Period shall be \$ _____

Item 4: Subject to Sections 4 and 11 hereof, the Single Loss Limit of Liability is \$ _____ and the Single Loss Deductible is \$ _____

Provided, however, that if any amounts are inserted below opposite specified Insuring Agreements or Coverage, those amounts shall be controlling. Any amount set forth below shall be part of and not in addition to amounts set forth above. (If an Insuring Agreement or Coverage is to be deleted, insert "Not Covered.")

| Amount applicable to: | Single Loss Limit of Liability | Single Loss Deductible |
|---|-----------------------------------|---------------------------|
| Insuring Agreement (D) —FORGERY OR ALTERATION | \$ | \$ |
| Insuring Agreement (E) —SECURITIES | \$ | \$ |
| Optional Insuring Agreements and Coverages: | \$ | \$ |

If "Not Covered" is inserted above opposite any specified Insuring Agreement or Coverage, such Insuring Agreement or Coverage and any other reference thereto in this bond shall be deemed to be deleted therefrom.

Item 5. The liability of the Underwriter is subject to the terms of the following riders attached hereto:

Item 6. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or canceling prior bond(s) or policy(ies) No.(s) such termination or cancelation to be effective as of the time this bond becomes effective.

The Underwriter, in consideration of an agreed premium, and in reliance upon all statements made and information furnished to the Underwriter by the Insured in applying for this bond, and subject to the Declarations, Insuring Agreements, General Agreements, Conditions and Limitations and other terms hereof, agrees to indemnify the Insured for:

INSURING AGREEMENTS

FIDELITY

(A) Loss resulting directly from dishonest or fraudulent acts committed by an Employee acting alone or in collusion with others.

Such dishonest or fraudulent acts must be committed by the Employee with the manifest intent:

- (a) to cause the Insured to sustain such loss; and
- (b) to obtain financial benefit for the Employee or another person or entity.

However, if some or all of the Insured's loss results directly or indirectly from Loans, that portion of the loss is not covered unless the Employee was in colla-

sion with one or more parties to the transactions and has received in connection therewith, a financial benefit with a value of at least \$2,500.

As used throughout this Insuring Agreement, financial benefit does not include any employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions.

ON PREMISES

- (B) (1) Loss of Property resulting directly from
- (a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or
 - (b) theft, false pretenses, common-law or statutory larceny, committed by a person present in an office or on the premises of the Insured, while the Property is lodged or deposited within offices or premises located anywhere.
- (2) Loss of or damage to
- (a) furnishings, fixtures, supplies or equipment within an office of the Insured covered under this bond resulting directly from larceny or theft in, or by burglary or robbery of, such office, or attempt thereat, or by vandalism or malicious mischief, or
 - (b) such office resulting from larceny or theft in, or by burglary or robbery of such office or attempt thereat, or to the interior of such office by vandalism or malicious mischief,
- provided that
- (i) the Insured is the owner of such furnishings, fixtures, supplies, equipment, or office or is liable for such loss or damage, and
 - (ii) the loss is not caused by fire.

IN TRANSIT

- (C) Loss of Property resulting directly from robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or made away with, and damage thereto or destruction thereof, while the Property is in transit anywhere in the custody of
- (a) a natural person acting as a messenger of the Insured (or another natural person acting as messenger or custodian during an emergency arising from the incapacity of the original messenger), or
 - (b) a Transportation Company and being transported in an armored motor vehicle, or
 - (c) a Transportation Company and being transported in a conveyance other than an armored motor vehicle provided that covered Property transported in such manner is limited to the following:
 - (i) records, whether recorded in writing or electronically, and
 - (ii) Certificated Securities issued in registered form and not endorsed, or with restrictive endorsements, and
 - (iii) Negotiable Instruments not payable to bearer, or not endorsed, or with restrictive endorsements.

Coverage under this Insuring Agreement begins immediately upon the receipt of such Property by the natural person or Transportation Company and ends immediately upon delivery to the designated recipient or its agent.

FORGERY OR ALTERATION

(D) Loss resulting directly from

(1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt); Acceptance, Withdrawal Order, receipt for the withdrawal of Property, Certificate of Deposit or Letter of Credit.

(2) transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear a signature which is a Forgery or have been altered without the knowledge and consent of such customer or banking institution. Telegraphic, cable or teletype instructions or advices, as aforesaid, exclusive of transmissions of electronic funds transfer systems, sent by a person other than the said customer or banking institution purporting to send such instructions or advices shall be deemed to bear a signature which is a Forgery.

A mechanically reproduced facsimile signature is treated the same as a hand-written signature.

SECURITIES

(E) Loss resulting directly from the Insured having, in good faith, for its own account or for the account of others

(1) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, any original

(a) Certificated Security,

(b) Document of Title,

(c) deed, mortgage or other instrument conveying title to, or creating or discharging a lien upon, real property,

(d) Certificate of Origin or Title,

(e) Evidence of Debt,

(f) corporate, partnership or personal Guarantee,

(g) Security Agreement,

(h) Instruction to a Federal Reserve Bank of the United States, or

(i) Statement of Uncertificated Security of any Federal Reserve Bank of the United States

which

(i) bears a signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent, registrar, acceptor, surety, guarantor, or of any person signing in any other capacity which is a Forgery, or

(ii) is altered, or

(iii) is lost or stolen;

(2) guaranteed in writing or witnessed any signature upon any transfer, assignment, bill of sale, power of attorney, Guarantee, endorsement or any items listed in (a) through (h) above;

(3) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of any item listed in (a) through (d) above which is a Counterfeit.

Actual physical possession of the items listed in (a) through (i) above by the Insured, its correspondent bank or other authorized representative, is a condition precedent to the Insured's having relied on the faith of such items.

A mechanically reproduced facsimile signature is treated the same as a hand-written signature.

COUNTERFEIT CURRENCY

(F) Loss resulting directly from the receipt by the Insured, in good faith, of any Counterfeit Money of the United States of America, Canada or of any other country in which the Insured maintains a branch office.

GENERAL AGREEMENTS

NOMINEES

A. Loss sustained by any nominee organized by the Insured for the purpose of handling certain of its business transactions and composed exclusively of its Employees shall, for all the purposes of this bond and whether or not any partner of such nominee is implicated in such loss, be deemed to be loss sustained by the Insured.

ADDITIONAL OFFICES OR EMPLOYEES—CONSOLIDATION, MERGER OR PURCHASE OF ASSETS—NOTICE

B. If the Insured shall, while this bond is in force, establish any additional offices, other than by consolidation or merger with, or purchase or acquisition of assets or liabilities of, another institution, such offices shall be automatically covered hereunder from the date of such establishment without the requirement of notice to the Underwriter or the payment of additional premium for the remainder of the premium period.

If the Insured shall, while this bond is in force, consolidate or merge with, or purchase or acquire assets or liabilities of, another institution, the Insured shall not have such coverage as is afforded under this bond for loss which

- (a) has occurred or will occur in offices or premises, or
- (b) has been caused or will be caused by an employee or employees of such institution, or
- (c) has arisen or will arise out of the assets or liabilities acquired by the Insured as a result of such consolidation, merger or purchase or acquisition of assets or liabilities unless the Insured shall
 - (i) give the Underwriter written notice of the proposed consolidation, merger or purchase or acquisition of assets or liabilities prior to the proposed effective date of such action and
 - (ii) obtain the written consent of the Underwriter to extend the coverage provided by this bond to such additional offices or premises, Employees and other exposures, and
 - (iii) upon obtaining such consent, pay to the Underwriter an additional premium.

CHANGE OF CONTROL—NOTICE

C. When the Insured learns of a change in control, it shall give written notice to the Underwriter.

As used in this General Agreement, control means the power to determine the management or policy of a controlling holding company or the Insured by virtue of voting stock ownership. A change in ownership of voting stock which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten percent (10%) or more of such stock shall be presumed to result in a change of control for the purpose of the required notice.

Failure to give the required notice shall result in termination of coverage for any loss involving a transferee, to be effective upon the date of the stock transfer.

REPRESENTATION OF INSURED

D. The Insured represents that the information furnished in the application for this bond is complete, true and correct. Such application constitutes part of this bond.

Any misrepresentation, omission, concealment or any incorrect statement of a material fact, in the application or otherwise, shall be grounds for the rescission of this bond.

JOINT INSURED

E. If two or more Insureds are covered under this bond, the first named Insured shall act for all Insureds. Payment by the Underwriter to the first named Insured of loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases to be covered under this bond, the Insured next named shall thereafter be considered as the first named Insured. Knowledge possessed or discovery made by any Insured shall constitute knowledge or discovery by all Insureds for all purposes of this bond. The liability of the Underwriter for loss or losses sustained by all Insureds shall not exceed the amount for which the Underwriter would have been liable had all such loss or losses been sustained by one Insured.

NOTICE OF LEGAL PROCEEDINGS AGAINST INSURED—ELECTION TO DEFEND

F. The Insured shall notify the Underwriter at the earliest practicable moment, not to exceed 30 days after notice thereof, of any legal proceeding brought to determine the Insured's liability for any loss, claim or damage, which, if established, would constitute a collectible loss under this bond. Concurrently, the Insured shall furnish copies of all pleadings and pertinent papers to the Underwriter.

The Underwriter, at its sole option, may elect to conduct the defense of such legal proceeding, in whole or in part. The defense by the Underwriter shall be in the Insured's name through attorneys selected by the Underwriter. The Insured shall provide all reasonable information and assistance required by the Underwriter for such defense.

If the Underwriter elects to defend the Insured, in whole or in part, any judgment against the Insured on those counts or causes of action which the Underwriter defended on behalf of the Insured or any settlement in which the Underwriter participates and all attorneys' fees, costs and expenses incurred by the Underwriter in the defense of the litigation shall be a loss covered by this bond.

If the Insured does not give the notices required in subsection (a) of Section 5 of this bond and in the first paragraph of this General Agreement, or if the Underwriter elects not to defend any causes of action, neither a judgment against the Insured, nor a settlement of any legal proceeding by the Insured, shall determine the existence, extent or amount of coverage under this bond for loss sustained by the Insured, and the Underwriter shall not be liable for any attorneys' fees, costs and expenses incurred by the Insured.

With respect to this General Agreement, subsections (b) and (d) of Section 5 of this bond apply upon the entry of such judgment or the occurrence of such settlement instead of upon discovery of loss. In addition, the Insured must notify the Underwriter within 30 days after such judgment is entered against it or after the Insured settles such legal proceeding, and, subject to subsection (e) of Section 5,

the Insured may not bring legal proceedings for the recovery of such loss after the expiration of 24 months from the date of such final judgment or settlement.

CONDITIONS AND LIMITATIONS

DEFINITIONS

Section 1. As used in this bond:

- (a) Acceptance means a draft which the drawee has, by signature written thereon, engaged to honor as presented.
- (b) Certificate of Deposit means an acknowledgment in writing by a financial institution of receipt of Money with an engagement to repay it.
- (c) Certificate of Origin or Title means a document issued by a manufacturer of personal property or a governmental agency evidencing the ownership of the personal property and by which ownership is transferred.
- (d) Certificated Security means a share, participation or other interest in property of or an enterprise of the issuer or an obligation of the issuer, which is:
 - (1) represented by an instrument issued in bearer or registered form;
 - (2) of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
 - (3) either one of a class or series or by its terms divisible into a class or series of shares, participations, interests or obligations.
- (e) Counterfeit means an imitation which is intended to deceive and to be taken as an original.
- (f) Document of Title means a bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers and must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.
- (g) Employee means
 - (1) an officer or other employee of the Insured, while employed in, at, or by any of the Insured's offices or premises covered hereunder, and a guest student pursuing studies or duties in any of said offices or premises;
 - (2) an attorney retained by the Insured and an employee of such attorney while either is performing legal services for the Insured;
 - (3) a person provided by an employment contractor to perform employee duties for the Insured under the Insured's supervision at any of the Insured's offices or premises covered hereunder;
 - (4) an employee of an institution merged or consolidated with the Insured prior to the effective date of this bond; and
 - (5) each natural person, partnership or corporation authorized by the Insured to perform services as data processor of checks or other accounting records of the Insured (not including preparation or modification of computer software or programs), herein called Processor. (Each such Processor, and the partners, officers and employees of such Processor shall, collectively, be deemed to be one Employee for all the purposes of this bond, excepting, however, the second paragraph of Section 12. A Federal Reserve Bank or clearing house shall not be construed to be a processor.)

(h) Evidence of Debt means an instrument, including a Negotiable Instrument, executed by a customer of the Insured and held by the Insured which in the regular course of business is treated as evidencing the customer's debt to the Insured.

(i) Forgery means the signing of the name of another person or organization with intent to deceive; it does not mean a signature which consists in whole or in part of one's own name signed with or without authority, in any capacity, for any purpose.

(j) Guarantee means a written undertaking obligating the signer to pay the debt of another to the Insured or its assignee or to a financial institution from which the Insured has purchased participation in the debt, if the debt is not paid in accordance with its terms.

(k) Instruction means a written order to the issuer of an Uncertificated Security requesting that the transfer, pledge, or release from pledge of the Uncertificated Security specified be registered.

(l) Letter of Credit means an engagement in writing by a bank or other person made at the request of a customer that the bank or other person will honor drafts or other demands for payment upon compliance with the conditions specified in the Letter of Credit.

(m) Loan means all extensions of credit by the Insured and all transactions creating a creditor relationship in favor of the Insured and all transactions by which the Insured assumes an existing creditor relationship.

(n) Money means a medium of exchange in current use authorized or adopted by a domestic or foreign government as a part of its currency.

(o) Negotiable Instrument means any writing

(1) signed by the maker or drawer; and

(2) containing any unconditional promise or order to pay a sum certain in Money and no other promise, order, obligation or power given by the maker or drawer; and

(3) is payable on demand or at a definite time; and

(4) is payable to order or bearer.

(p) Property means Money, Certificated Securities, Uncertificated Securities of any Federal Reserve Bank of the United States, Negotiable Instruments, Certificates of Deposit, Documents of Title, Acceptances, Evidences of Debt, Security Agreements, Withdrawal Orders, Certificates of Origin or Title, Letters of Credit, insurance policies, abstracts of title, deeds and mortgages on real estate, revenue and other stamps, tokens, unsold state lottery tickets, books of account and other records whether recorded in writing or electronically, gems, jewelry, precious metals in bars or ingots, and tangible items of personal property which are not hereinbefore enumerated.

(q) Security Agreement means an agreement which creates an interest in personal property or fixtures and which secures payment or performance of an obligation.

(r) Statement of Uncertificated Security means a written statement of the issuer of an Uncertificated security containing:

(1) A description of the issue of which the Uncertificated Security is a part;

(2) the number of shares or units:

(a) transferred to the registered owner;

(b) pledged by the registered owner to the registered pledgee;

(c) released from pledge by the registered pledgee;

- (d) registered in the name of the registered owner on the date of the statement; or
- (e) subject to pledge on the date of the statement;
- (3) the name and address of the registered owner and registered pledgee;
- (4) a notation of any liens and restrictions of the issuer and any adverse claims to which the Uncertificated Security is or may be subject or a statement that there are none of those liens, restrictions or adverse claims; and
- (5) the date:
 - (a) the transfer of the shares or units to the new registered owner of the shares or units was registered;
 - (b) the pledge of the registered pledgee was registered, or
 - (c) of the statement, if it is a periodic or annual statement.
- (s) Transportation Company means any organization which provides its own or leased vehicles for transportation or which provides freight forwarding or air express services.
- (t) Uncertificated Security means a share, participation or other interest in property of or an enterprise of the issuer of an obligation of the issuer, which is:
 - (1) not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer;
 - (2) of a type commonly dealt in on securities exchanges or markets; and
 - (3) either one of a class or series or by its terms divisible into a class or series of shares, participations, interests or obligations.
- (u) Withdrawal Order means a non-negotiable instrument, other than an Instruction, signed by a customer of the Insured authorizing the Insured to debit the customer's account in the amount of funds stated therein.

EXCLUSIONS

Section 2. This bond does not cover:

- (a) loss resulting directly or indirectly from forgery or alteration, except when covered under Insuring Agreements (A), (D), (E) or (F);
- (b) loss due to riot or civil commotion outside the United States of America and Canada; or loss due to military, naval or usurped power, war or insurrection unless such loss occurs in transit in the circumstances recited in Insuring Agreement (C), and unless, when such transit was initiated, there was no knowledge of such riot, civil commotion, military, naval or usurped power, war or insurrection on the part of any person acting for the Insured in initiating such transit;
- (c) loss resulting directly or indirectly from the effects of nuclear fission or fusion or radioactivity; provided, however, that this paragraph shall not apply to loss resulting from industrial uses of nuclear energy;
- (d) loss resulting directly or indirectly from any acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the board of directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured;
- (e) loss resulting directly or indirectly from the complete or partial nonpayment of, or default upon, any Loan or transaction involving the Insured as a lender or borrower, or extension of credit, including the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or Evi-

dences of Debt, whether such Loan, transaction or extension was procured in good faith or through trick, artifice, fraud or false pretenses, except when covered under Insuring Agreements (A), (D) or (E);

(f) loss of Property contained in customers' safe deposit boxes, except when the Insured is legally liable therefor and the loss is covered under Insuring Agreement (A);

(g) loss through cashing or paying forged or altered travelers' checks or travelers' checks bearing forged endorsements, except when covered under Insuring Agreement (A); or loss of unsold travelers' checks or unsold money orders placed in the custody of the Insured with authority to sell, unless (a) the Insured is legally liable for such loss and (b) such checks or money orders are later paid or honored by the drawer thereof, except when covered under Insuring Agreement (A);

(h) loss caused by an Employee, except when covered under Insuring Agreement (A) or when covered under Insuring Agreement (B) or (C) and resulting directly from misplacement, mysterious unexplainable disappearance or destruction of or damage to Property;

(i) loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, and notwithstanding any act or omission on the part of any Employee in connection with any account relating to such trading, indebtedness, or balance, except when covered under Insuring Agreements (D) or (E);

(j) shortage in any teller's cash due to error, regardless of the amount of such shortage, and any shortage in any teller's cash which is not in excess of the normal shortage in the tellers' cash in the office where such shortage shall occur shall be presumed to be due to error;

(k) loss resulting directly or indirectly from the use or purported use of credit, debit, charge, access, convenience, identification or other cards

(1) in obtaining credit or funds, or

(2) in gaining access to automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, or

(3) in gaining access to point of sale terminals, customer-bank communication terminals, or similar electronic terminals of electronic funds transfer systems.

whether such cards were issued, or purport to have been issued, by the Insured or by anyone other than the Insured, except when covered under Insuring Agreement (A);

(l) loss involving automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, unless such automated mechanical devices are situated within an office of the Insured which is permanently staffed by an Employee whose duties are those usually assigned to a bank teller, even though public access is from outside the confines of such office, but in no event shall the Underwriter be liable for loss (including loss of Property)

(1) as a result of damage to such automated mechanical devices from vandalism or malicious mischief perpetrated from outside such office, or

(2) as a result of failure of such automated mechanical devices to function properly, or

(3) through misplacement or mysterious unexplainable disappearance

- while such Property is located within any such automated mechanical devices, except when covered under Insuring Agreement (A);
- (m) loss through the surrender of Property away from an office of the Insured as a result of a threat
 - (1) to do bodily harm to any person, except loss of Property in transit in the custody of any person acting as messenger provided that when such transit was initiated there was no knowledge by the Insured of any such threat, or
 - (2) to do damage to the premises or property of the Insured, except when covered under Insuring Agreement (A);
- (n) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving erroneous credits to such account, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the Insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A);
- (o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit which are not finally paid for any reason, including but not limited to Forgery or any other fraud, except when covered under Insuring Agreement (A);
- (p) loss resulting directly or indirectly from counterfeiting, except when covered under Insuring Agreements (A), (E) or (F);
- (q) loss of any tangible item of personal property which is not specifically enumerated in the paragraph defining Property and for which the Insured is legally liable, if such property is specifically insured by other insurance of any kind and in any amount obtained by the Insured, and in any event, loss of such property occurring more than 60 days after the Insured shall have become aware that it is liable for the safekeeping of such property, except when covered under Insuring Agreements (A) or (B)(2);
- (r) loss of Property while
 - (1) in the mail, or
 - (2) in the custody of any Transportation Company, unless covered under Insuring Agreement (C)
- except when covered under Insuring Agreement (A);
- (s) potential income, including but not limited to interest and dividends, not realized by the Insured;
- (t) damages of any type for which the Insured is legally liable, except compensatory damages, but not multiples thereof, arising directly from a loss covered under this bond;
- (u) all fees, costs and expenses incurred by the Insured
 - (1) in establishing the existence of or amount of loss covered under this bond, or
 - (2) as a party to any legal proceeding whether or not such legal proceeding exposes the Insured to loss covered by this bond;
- (v) indirect or consequential loss of any nature;
- (w) loss resulting from any violation by the Insured or by any Employee
 - (1) of law regulating (i) the issuance, purchase or sale of securities, (ii) securities transactions upon security exchanges or over the counter market, (iii) investment companies, or (iv) investment advisers, or
 - (2) of any rule or regulation made pursuant to any such law, unless it is established by the Insured that the act or acts which caused

the said loss involved fraudulent or dishonest conduct which would have caused a loss to the Insured in a similar amount in the absence of such laws, rules or regulations;

(x) loss resulting directly or indirectly from the failure of a financial or depository institution, or its receiver or liquidator, to pay or deliver, on demand of the Insured, funds or Property of the Insured held by it in any capacity, except when covered under Insuring Agreements (A) or (B)(1)(a);

(y) loss involving any Uncertificated Security except an Uncertificated Security of any Federal Reserve Bank of the United States or when covered under Insuring Agreement (A);

(z) damages resulting from any civil, criminal or other legal proceeding in which the Insured is alleged to have engaged in racketeering activity except when the Insured establishes that the act or acts giving rise to such damages were committed by an Employee under circumstances which result directly in a loss to the Insured covered by Insuring Agreement (A). For the purposes of this exclusion, "racketeering activity" is defined in 18 United States Code 1961 et seq., as amended.

DISCOVERY

Section 3. This bond applies to loss discovered by the Insured during the Bond Period. Discovery occurs when the Insured first becomes aware of facts which would cause a reasonable person to assume that a loss of a type covered by this bond has been or will be incurred, regardless of when the act or acts causing or contributing to such loss occurred, even though the exact amount or details of loss may not then be known.

Discovery also occurs when the Insured receives notice of an actual or potential claim in which it is alleged that the Insured is liable to a third party under circumstances which, if true, would constitute a loss under this bond.

LIMIT OF LIABILITY

Section 4

Aggregate Limit of Liability

The Underwriter's total liability for all losses discovered during the Bond Period shown in Item 2 of the Declarations shall not exceed the Aggregate Limit of Liability shown in Item 3 of the Declarations. The Aggregate Limit of Liability shall be reduced by the amount of any payment made under the terms of this bond.

Upon exhaustion of the Aggregate Limit of Liability by such payments:

- (a) The Underwriter shall have no further liability for loss or losses regardless of when discovered and whether or not previously reported to the Underwriter, and
- (b) The Underwriter shall have no obligation under General Agreement F to continue the defense of the Insured, and upon notice by the Underwriter to the Insured that the Aggregate Limit of Liability has been exhausted, the Insured shall assume all responsibility for its defense at its own cost.

The Aggregate Limit of Liability shall not be increased or reinstated by any recovery made and applied in accordance with subsections (a), (b) and (c) of Section 7. In the event that a loss of Property is settled by the Underwriter through the use of a lost instrument bond, such loss shall not reduce the Aggregate Limit of Liability.

Single Loss Limit of Liability

Subject to the Aggregate Limit of Liability, the Underwriter's liability for each Single Loss shall not exceed the applicable Single Loss Limit of Liability shown in Item 4 of the Declarations. If a Single Loss is covered under more than one Insuring Agreement or Coverage, the maximum payable shall not exceed the largest applicable Single Loss Limit of Liability.

Single Loss Defined

Single Loss means all covered loss, including court costs and attorneys' fees incurred by the Underwriter under General Agreement F, resulting from

- (a) any one act or series of related acts of burglary, robbery or attempt thereof, in which no Employee is implicated, or
- (b) any one act or series of related unintentional or negligent acts or omissions on the part of any person (whether an Employee or not) resulting in damage to or destruction or misplacement of Property, or
- (c) all acts or omissions other than those specified in (a) and (b) preceding, caused by any person (whether an Employee or not) or in which such person is implicated, or
- (d) any one casualty or event not specified in (a), (b) or (c) preceding.

NOTICE OF LOSS

LEGAL PROCEEDINGS AGAINST UNDERWRITER

Section 5.

- (a) At the earliest practicable moment, not to exceed 30 days, after discovery of loss, the Insured shall give the Underwriter notice thereof.
- (b) Within 6 months after such discovery, the Insured shall furnish to the Underwriter proof of loss, duly sworn to, with full particulars.
- (c) Lost ~~Certificated~~ Securities listed in a proof of loss shall be identified by certificate or bond numbers if such securities were issued therewith.
- (d) Legal proceedings for the recovery of any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is filed with the Underwriter or after the expiration of 24 months from the discovery of such loss.
- (e) If any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to equal the minimum period of limitation provided by such law.
- (f) This bond affords coverage only in favor of the Insured. No suit, action or legal proceedings shall be brought hereunder by any one other than the named Insured.

VALUATION

Section 6. Any loss of Money, or loss payable in Money, shall be paid, at the option of the Insured, in the Money of the country in which the loss was sustained or in the United States of America dollar equivalent thereof determined at the rate of exchange at the time of payment of such loss.

Securities

The Underwriter shall settle in kind its liability under this bond on account of a loss of any securities or, at the option of the Insured, shall pay to the Insured the cost of replacing such securities, determined by the market value thereof at the

time of such settlement. In case of a loss of subscription, conversion or redemption privileges through the misplacement or loss of securities, the amount of such loss shall be the value of such privileges immediately preceding the expiration thereof. If such securities cannot be replaced or have no quoted market value, or if such privileges have no quoted market value, their value shall be determined by agreement or arbitration.

If the applicable coverage of this bond is subject to a Deductible Amount and, or is not sufficient in amount to indemnify the Insured in full for the loss of securities for which claim is made hereunder, the liability of the Underwriter under this bond is limited to the payment for, or the duplication of, so much of such securities as has a value equal to the amount of such applicable coverage.

Books of Account and Other Records

In cases of loss of, or damage to, any books of account or other records used by the Insured in its business, the Underwriter shall be liable under this bond only if such books or records are actually reproduced and then for not more than the cost of the blank books, blank pages or other materials plus the cost of labor for the actual transcription or copying of data which shall have been furnished by the Insured in order to reproduce such books and other records.

Property other than Money, Securities or Records

In cases of loss of, or damage to, any Property other than Money, securities, books of account or other records, or damage covered under Insuring Agreement (B)(2), the Underwriter shall not be liable for more than the actual cash value of such Property, or of items covered under Insuring Agreement (B)(2). The Underwriter may, at its election, pay the actual cash value of, replace or repair such property. Disagreement between the Underwriter and the Insured as to the cash value or as to the adequacy of repair or replacement shall be resolved by arbitration.

ASSIGNMENT—SUBROGATION—RECOVERY—COOPERATION

Section 7.

(a) In the event of payment under this bond, the Insured shall deliver, if so requested by the Underwriter, an assignment of such of the Insured's rights, title and interest and causes of action as it has against any person or entity to the extent of the loss payment.

(b) In the event of payment under this bond, the Underwriter shall be subrogated to all of the Insured's rights of recovery therefor against any person or entity to the extent of such payment.

(c) Recoveries, whether effected by the Underwriter or by the Insured, shall be applied net of the expense of such recovery first to the satisfaction of the Insured's loss which would otherwise have been paid but for the fact that it is in excess of either the Single or Aggregate Limit of Liability, secondly, to the Underwriter as reimbursement of amounts paid in settlement of the Insured's claim, and thirdly, to the Insured in satisfaction of any Deductible Amount. Recovery on account of loss of securities as set forth in the second paragraph of Section 6 or recovery from reinsurance and/or indemnity of the Underwriter shall not be deemed a recovery as used herein.

(d) Upon the Underwriter's request and at reasonable times and places designated by the Underwriter the Insured shall

- (1) submit to examination by the Underwriter and subscribe to the same under oath; and
- (2) produce for the Underwriter's examination all pertinent records; and
- (3) cooperate with the Underwriter in all matters pertaining to the loss.

(e) The Insured shall execute all papers and render assistance to secure to the Underwriter the rights and causes of action provided for herein. The Insured shall do nothing after discovery of loss to prejudice such rights or causes of action.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

Section 8. With respect to any loss set forth in sub-section (c) of Section 4 of this bond which is recoverable or recovered in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried hereunder on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss if the latter amount be the larger.

If the coverage of this bond supersedes in whole or in part the coverage of any other bond or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 9. Coverage afforded hereunder shall apply only as excess over any valid and collectible insurance or indemnity obtained by the Insured, or by one other than the Insured on Property subject to exclusion (q) or by a Transportation Company, or by another entity on whose premises the loss occurred or which employed the person causing the loss or the messenger conveying the Property involved.

OWNERSHIP

Section 10. This bond shall apply to loss of Property (1) owned by the Insured, (2) held by the Insured in any capacity, or (3) for which the Insured is legally liable. This bond shall be for the sole use and benefit of the Insured named in the Declarations.

DEDUCTIBLE AMOUNT

Section 11. The Underwriter shall be liable hereunder only for the amount by which any single loss, as defined in Section 4, exceeds the Single Loss Deductible amount for the Insuring Agreement or Coverage applicable to such loss, subject to the Aggregate Limit of Liability and the applicable Single Loss Limit of Liability.

The Insured shall, in the time and in the manner prescribed in this bond, give the Underwriter notice of any loss of the kind covered by the terms of this bond, whether or not the Underwriter is liable therefore, and upon the request of the Underwriter shall file with it a brief statement giving the particulars concerning such loss.

TERMINATION OR CANCELATION

Section 12. This bond terminates as an entirety upon occurrence of any of the following:—(a) 60 days after the receipt by the Insured of a written notice from the Underwriter of its desire to cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written notice from the Insured of its desire to cancel this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution, or (e) immediately upon exhaustion of the Aggregate Limit of Liability, or (f) immediately upon expiration of the Bond Period as set forth in Item 2 of the Declarations.

This bond terminates as to any Employee or any partner, officer or employee of any Processor—(a) as soon as any Insured, or any director or officer not in collusion with such person, learns of any dishonest or fraudulent act committed by such person at any time, whether in the employment of the Insured or otherwise, whether or not of the type covered under Insuring Agreement (A) against the Insured or any other person or entity, without prejudice to the loss of any Property then in transit in the custody of such person, or (b) 15 days after the receipt by the Insured of a written notice from the Underwriter of its desire to cancel this bond as to such person.

Termination of the bond as to any Insured terminates liability for any loss sustained by such Insured which is discovered after the effective date of such termination.

In witness whereof, the Underwriter has caused this bond to be executed on the Declarations page.

Tab 5

SAVINGS AND LOAN BLANKET BOND

Standard Form No. 22, Revised to December, 1982

Bond No.

(Herein called Underwriter)

DECLARATIONS**Item 1.** Name of Insured (herein called Insured):

Principal Address:

Item 2. Bond Period: from 12:01 a.m. on _____ to 12:01 a.m. on the effective date
of the termination or cancelation of this bond, standard time at the Principal Address as to each of said dates.

Item 3. Limit of Liability and Deductible Amount—

Subject to Sections 3 and 11 hereof,

the Limit of Liability is \$

and the Deductible Amount is \$

(INSERT AMOUNT)

(INSERT AMOUNT)

Provided, however, that if any amounts are inserted below opposite specified Insuring Agreements or Coverage, those amounts shall be controlling. Any amount set forth below shall be part of and not in addition to amounts set forth above. (If an Insuring Agreement or Coverage is to be deleted, insert "Not Covered.")

Amount applicable to:

Limit of Liability

Deductible

Audit Expense Coverage

\$

Insuring Agreement (D)—FORGERY OR ALTERATION

\$

\$

Insuring Agreement (E)—SECURITIES

\$

\$

If "Not Covered" is inserted above opposite any specified Insuring Agreement or Coverage, such Insuring Agreement or Coverage and any other reference thereto in this bond shall be deemed to be deleted therefrom.

Item 4. Offices or Premises Covered—All the Insured's offices or premises in existence at the time this bond becomes effective are covered under this bond except the offices or premises located as follows:

Item 5. The liability of the Underwriter is subject to the terms of the following riders attached hereto:

Item 6. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or canceling prior bond(s) or policy(ies) No.(s) such termination or cancelation to be effective as of the time this bond becomes effective.

The Underwriter, in consideration of an agreed premium, subject to the Declarations, Insuring Agreements, General Agreements, Conditions and Limitations and other terms hereof, agrees to indemnify the Insured for:

INSURING AGREEMENTS

FIDELITY

(A) Loss resulting directly from dishonest or fraudulent acts of an Employee committed alone or in collusion with others.

Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent

- (a) to cause the Insured to sustain such loss, and
- (b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefit, other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

AUDIT EXPENSE

Expense incurred by the Insured for that part of the cost of audits or examinations required by State or Federal supervisory authorities to be conducted either by such authorities or by independent accountants by reason of the discovery of loss sustained by the Insured through dishonest or fraudulent acts of any of the Employees. The total liability of the Underwriter for such expense by reason of such acts of any Employee or in which such Employee is concerned or implicated or with respect to any one audit or examination is limited to the amount stated opposite "Audit Expense Coverage" in Item 3 of the Declarations; it being understood, however, that such expense shall be deemed to be loss sustained by the Insured through dishonest or fraudulent act of one or more of the Employees and the liability of the Underwriter under this paragraph of Insuring Agreement (A) shall be a part of and not in addition to the Limit of Liability stated in Item 3 of the Declarations.

ON PREMISES

(B) (1) Loss of Property resulting directly from

- (a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof while the Property is lodged or deposited within offices or premises located anywhere, or
- (b) theft, false pretenses, common law or statutory larceny committed by a person
 - (i) present in an office of, or on the premises of, the Insured, or
 - (ii) present on the premises in which the Property is lodged or deposited.

(2) Loss of or damage to

- (a) furnishings, fixtures, supplies or equipment within an office of the Insured covered under this bond resulting directly from larceny or theft in, or by burglary or robbery of, such office, or attempt thereat, or by vandalism or malicious mischief, or
- (b) such office resulting from larceny or theft in, or by burglary or robbery of such office or attempt thereat, or to the interior of such office by vandalism or malicious mischief, provided that
 - (i) the Insured is the owner of such furnishings, fixtures, supplies, equipment, or office or is liable for such loss or damage, and
 - (ii) the loss is not caused by fire.

IN TRANSIT

(C) Loss of Property resulting directly from robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or otherwise made away with, and damage thereto or destruction thereof while the Property is in the custody of a person designated by the Insured to act as its messenger (or a person acting as messenger or custodian during an emergency arising

from the incapacity of such designated messenger) and while the Property is in transit anywhere, such transit to begin immediately upon receipt of such Property by said messenger and to end immediately upon delivery to the designated recipient or its agent.

FORGERY OR ALTERATION

(D) Loss resulting directly from

(1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt), Acceptance, Withdrawal order, receipt for the withdrawal of Property, Certificate of Deposit or Letter of Credit,

(2) transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear a signature which is a Forgery or have been altered without the knowledge and consent of such customer or banking institution. Telegraphic, cable or teletype instructions or advices, as aforesaid, exclusive of transmissions of electronic funds transfer systems, sent by a person other than the said customer or banking institution purporting to send such instructions or advices shall be deemed to bear a signature which is a Forgery.

A mechanically reproduced facsimile signature is treated the same as a handwritten signature.

SECURITIES

(E) Loss resulting directly from the Insured having, in good faith, for its own account or for the account of others,

(1) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original

- (a) Security,
- (b) Document of Title,
- (c) deed, mortgage or other instrument conveying title to, or creating or discharging a lien upon, real property,
- (d) Certificate of Origin or Title,
- (e) Evidence of Debt,
- (f) corporate, partnership or personal Guarantee, or
- (g) Security Agreement

which

(i) bears a signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent, registrar, acceptor, surety, guarantor, or of any person signing in any other capacity which is a Forgery, or

- (ii) is altered, or
- (iii) is lost or stolen;

(2) guaranteed in writing or witnessed any signature upon any transfer, assignment, bill of sale, power of attorney, Guarantee, endorsement or any items listed in (a) through (g) above;

(3) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any item listed in (a) through (d) above which is a Counterfeit.

Actual physical possession of the items listed in (a) through (g) above by the Insured, its correspondent institution or other authorized representative, is a condition precedent to the Insured's having relied on the faith of, or otherwise acted upon, such items.

A mechanically reproduced facsimile signature is treated the same as a handwritten signature.

COUNTERFEIT CURRENCY

(F) Loss resulting directly from the receipt by the Insured, in good faith, of any Counterfeit or altered Money of the United States of America or Canada.

GENERAL AGREEMENTS

ADDITIONAL OFFICES OR EMPLOYEES—CONSOLIDATION, MERGER OR PURCHASE OF ASSETS—NOTICE

A. If the Insured shall, while this bond is in force, establish any additional offices, other than by consolidation or merger with, or purchase of assets of, another institution, such offices shall be automatically covered hereunder from the date of such establishment without the requirement of notice to the Underwriter or the payment of additional premium for the remainder of the premium period.

If the Insured shall, while this bond is in force, consolidate or merge with, or purchase assets of, another institution, the Insured shall not have such coverage as is afforded under this bond for loss which

- (a) has occurred or will occur in offices or premises, or
- (b) has been caused or will be caused by an employee or employees of an institution, or
- (c) has arisen or will arise out of the assets

acquired by the Insured as a result of such consolidation, merger or purchase of assets; unless the Insured shall

- (b) the total number of shares or voting rights owned by the transferors and the transferees (or the beneficial owners), both immediately before and after the transfer, and
- (c) the total number of outstanding shares of voting stock or voting rights.

As used in this General Agreement, control means the power to determine the management or policy of the Insured by virtue of voting stock or voting rights ownership. A change in ownership of voting stock or voting rights which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten per cent (10%) or more of the outstanding voting stock or voting rights of the Insured shall be presumed to result in a change of control for the purpose of the required notice.

Failure to give the required notice shall result in termination of coverage of this bond, effective upon the date of stock transfer or voting rights transfer for any loss in which any transferee is implicated.

WARRANTY

C. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement.

JOINT INSURED

D. If two or more Insureds are covered under this bond, the first named Insured shall act for all Insureds. Payment by the Underwriter to the first named Insured of loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases to be covered under this bond, the Insured next named shall thereafter be considered as the first named Insured. Knowledge possessed or discovery made by any Insured shall constitute knowledge or discovery by all Insureds for all purposes of this bond.

- (i) give the Underwriter written notice of the proposed consolidation, merger or purchase of assets at least 60 days prior to the proposed effective date of the consolidation, merger or purchase of assets, and
- (ii) obtain the written consent of the Underwriter to extend the coverage provided by this bond to such additional offices or premises, Employees and other exposures, and
- (iii) pay to the Underwriter an additional premium computed pro rata from the date of such consolidation, merger or purchase of assets to the end of the current premium period.

CHANGE OF CONTROL—NOTICE

B. When the Insured learns of a transfer of its outstanding voting stock or voting rights (including rights with respect to withdrawable accounts) which results in a change in control of the Insured, it shall within 30 days give written notice to the Underwriter setting forth

- (a) the names of the transferors and transferees (or the names of the beneficial owners if the shares or voting rights are registered in another name), and

poses of this bond. The liability of the Underwriter for loss or losses sustained by all Insureds shall not exceed the amount for which the Underwriter would have been liable had all such loss or losses been sustained by one Insured.

COURT COSTS AND ATTORNEYS' FEES

E. The Underwriter shall indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a collectible loss under this bond in excess of any Deductible Amount.

The Insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding and at the request of the Underwriter shall furnish it with copies of all pleadings and other papers therein. At the Underwriter's election the Insured shall permit the Underwriter to conduct the defense of such suit or legal proceeding, in the Insured's name, through attorneys of the Underwriter's selection. In such event, the Insured shall give all reasonable information and assistance which the Underwriter shall deem necessary to the defense of such suit or legal proceeding.

If the amount of the Insured's liability or alleged liability is greater than the amount recoverable under this bond, or if a Deductible Amount is applicable, or both, the liability of the Underwriter under this General Agreement is limited to the proportion of court costs and attorneys' fees incurred and paid by the Insured or by the Underwriter that the amount recoverable under this bond bears to the total of such amount plus the amount which is not so recoverable. Such indemnity shall be a part of the Limit of Liability for the applicable Insuring Agreement or Coverage.

If the Underwriter pays court costs and attorneys' fees in excess of its proportionate share of such costs and fees, the Insured shall promptly reimburse the Underwriter for such excess.

CONDITIONS AND LIMITATIONS

DEFINITIONS

Section 1. As used in this bond:

- (a) Acceptance means a draft which the drawee has, by signature written thereon, engaged to honor as presented.
- (b) Certificate of Deposit means an acknowledgment in writing by a financial institution of receipt of Money with an engagement to repay it.
- (c) Certificate of Origin or Title means a document issued by a manufacturer of personal property or a governmental agency evidencing the ownership of the personal property and by which ownership is transferred.
- (d) Counterfeit means an imitation which is intended to deceive and to be taken as an original.
- (e) Document of Title means a bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers and must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.
- (f) Employee means:
 - (1) an officer or other employee of the insured, while employed in, at, or by any of the insured's offices or premises covered hereunder, and a guest student pursuing studies or duties in any of said offices or premises;
 - (2) an attorney retained by the insured and an employee of such attorney while either is performing legal services for the insured;
 - (3) a person provided by an employment contractor to perform employee duties for the insured under the insured's supervision at any of the insured's offices or premises covered hereunder;
 - (4) an officer or employee of an institution merged or consolidated with the insured prior to the effective date of this bond;
 - (5) each natural person, partnership or corporation authorized by the insured to perform services as data processor of checks or other accounting records of the insured (including preparation or modification of computer software or programs), herein called Processor. (Each such Processor, and the partners, officers and employees of such Processor, shall, collectively, be deemed to be one Employee for all the purposes of this bond, excepting, however, the third paragraph of Section 12. A Federal Reserve Bank or clearing house shall not be construed to be a processor.)
 - (6) a natural person (sometimes known as conveyancer) duly elected or appointed by the insured to draw deeds of conveyances of lands, to investigate titles of real property or otherwise to assist the insured in the making (as distinguished from the servicing or collection) of mortgage loans, while performing such services;
 - (7) a natural person duly elected or appointed by the insured to collect rents for the account of the insured while collecting or having possession of such rents; and
 - (8) a natural person appointed by or with the approval of the insured to make collection of savings from persons who compose, or purport to compose, a group making systematic deposits with the insured while collecting or having possession of any such savings and such savings, while upon the premises while collected and in the possession or custody of the said person collecting them, shall be deemed to be in the possession of the insured.
- (g) Evidence of Debt means an instrument, including a Negotiable Instrument, executed by a customer of the insured and held by the insured which in the regular course of business is treated as evidencing the customer's debt to the insured.
- (h) Forgery means the signing of the name of another with intent to deceive, or ~~any~~ non-include the signing of one's own name with or without authority in any capacity, for any purpose.
- (i) Guarantee means a written undertaking obligating the signer to pay the debt of another to the insured or its assignee or to a financial institution to which the insured has purchased participation in the debt, if the debt is not paid in accordance with its terms.
- (j) Letter of Credit means an engagement in writing by a bank or other person made at the request of a customer that the bank or other person will honor drafts or other demands for payment upon compliance with the conditions specified in the Letter of Credit.
- (k) Money means a medium of exchange in current use authorized or adopted by a domestic or foreign government as a part of its currency.
- (l) Negotiable Instrument means any writing:
 - (1) signed by the maker or drawer; and
 - (2) containing an unconditional promise or order to pay a sum certain in Money and no other promise, order, obligation or power given by the maker or drawer; and
 - (3) is payable on demand or at a definite time; and
 - (4) is payable to order or bearer.
- (m) Property means Money, Securities, Negotiable Instruments, Certificates of Deposit, Documents of Title, Acceptances, Evidences of Debt, Security Agreements, withdrawals, orders, Certificates of Origin or Title, Letters of Credit, insurance policies, abstracts of title, deeds and mortgages on real estate, revenue and other stamps, tokens, unsold state lottery tickets, books of account and other records whether recorded in writing or electronically, gems, jewelry, precious metals in bars or ingots, and tangible items of personal property which are not hereinbefore enumerated.
- (n) Security means an instrument which:
 - (1) is issued in ~~bearer~~ or registered form; and
 - (2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
 - (3) is either one of a class or series of instruments; and
 - (4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.
- (o) Security Agreement means an agreement which creates an interest in personal property or fixtures and which secures payment or performance of an obligation.

EXCLUSIONS

Section 2. This bond does not cover:

- (a) loss resulting directly or indirectly from Forgery or alteration except when covered under Insuring Agreements (A), (D), (E) or (F);
 - (b) loss due to riot or civil commotion outside the United States of America and Canada; or loss due to military, naval or usurped power, war or insurrection unless such loss occurs in transit in the circumstances recited in Insuring Agreement (C), and unless, when such transit was initiated, there was no knowledge of such riot, civil commotion, military, naval or usurped power, war or insurrection on the part of any person acting for the insured in initiating such transit;
 - (c) loss resulting directly or indirectly from the effects of nuclear fission or fusion or radioactive; provided, however, that this paragraph shall not apply to loss resulting from industrial uses of nuclear energy;
 - (d) loss resulting directly or indirectly from any act or acts of any director or trustee of the insured other than one employed as a salaried, pensioned or elected official or an Employee of the insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the board of directors or trustees of the insured to perform specific, as distinguished from general, directorial acts on behalf of the insured;
 - (e) loss resulting directly or indirectly from the complete or partial non-payment of, or default upon, any loan or transaction in the nature of a loan or extension of credit, whether involving the insured as a lender or as a borrower, including the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or Evidences of Debt, whether such loan or transaction was procured in good faith or through trick, artifice, fraud or false pretenses, except when covered under Insuring Agreements (A), (D) or (E);
 - (f) loss of Property contained in customers' safe deposit boxes, except when the insured is legally liable therefor and the loss is covered under Insuring Agreement (A);
 - (g) loss through cashing or paying forged or altered travelers' checks or travelers' checks bearing forged endorsements, except when covered under Insuring Agreement (A); or loss of unsold travelers' checks or unsold money orders placed in the custody of the insured with authority to cash, unless (a) the insured is legally liable for such loss and (b) such checks or money orders are later paid or honored by the drawer thereof, except when covered under Insuring Agreement (A);
 - (h) loss caused by an Employee, except when covered under Insuring Agreement (A) or when covered under Insuring Agreement (B) or (C) and resulting directly from misplacement, mysterious unexplainable disappearance or destruction of or damage to Property;
 - (i) loss resulting directly or indirectly from trading, with or without the knowledge of the insured, whether or not represented by any indebtedness or balance shown to be due the insured on any customer's account, actual or fictitious, and notwithstanding any act or omission on the part of any Employee in connection with any account relating to such trading, indebtedness, or balance, except when covered under Insuring Agreements (D) or (E);
 - (j) shortage in any teller's cash due to error, regardless of the amount of such shortage; and any shortage in any teller's cash which is not in excess of the normal shortage in the teller's cash in the office where such shortage shall occur shall be presumed to be due to error;
 - (k) loss resulting directly or indirectly from the use of credit, debit, charge, access, convenience, identification or other cards:
 - (1) in obtaining credit; or
 - (2) in gaining access to automated mechanical devices which, on behalf of the insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans; or
 - (3) in gaining access to point of sale terminals, customer-bank communication terminals, or similar electronic terminals of electronic funds transfer systems.whether such cards were issued, or purport to have been issued, by the insured or by anyone other than the insured, except when covered under Insuring Agreement (A);
 - (l) loss involving automated mechanical devices which, on behalf of the insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, unless such automated mechanical devices are situated within an office of the insured which is permanently staffed by an Employee whose duties are those usually assigned to a teller, even though public access is from outside the confines of such office, but in no event shall the Underwriter be liable for loss (including loss of Property)
 - (1) as a result of damage to such automated mechanical devices from vandalism or malicious mischief perpetrated from outside such office; or
 - (2) as a result of failure of such automated mechanical devices to function properly; or
 - (3) through misplacement or mysterious unexplainable disappearance while such Property is located within any such automated mechanical devices.
- except when covered under Insuring Agreement (A);
- (m) loss through the surrender of Property away from an office of the insured as a result of a threat:
 - (1) to do bodily harm to any person, except loss of Property in transit in the custody of any person acting as messenger provided that when such transit was initiated there was no knowledge by the insured of any such threat; or
 - (2) to do damage to the premises or property of the insured.
- except when covered under Insuring Agreement (A);
- (n) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving erroneous credits to such account, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A);
 - (o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit which are not finally paid for any reason, including but not limited to Forgery or any other fraud, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A);

LIMIT OF LIABILITY/NON-ACCUMULATION OF LIABILITY
Section 3. The total liability of the Underwriter under this bond or account of loss, including court costs and attorneys' fees, shall be limited by any one act of burglary, robbery or attempt thereof in which the insured is involved, to the amount of:

- (a) with respect to any one intentional or negligent act or omission on the part of any person (whether an Employee or not) resulting in damage to or destruction or misplacement of Property or
- (b) other than those specified in (a) and (b) preceding, caused by all acts or omissions by any person (whether an Employee or not) or all acts or omissions in which such person is involved; or
- (c) other than those specified in (a), (b) and (c) preceding, resulting from any one casualty or event.

The limit of liability shall be the amount specified in Section 3 of the Declaration of the bond or amendment thereto or to the amount of the applicable amount, if such amount be lesser, without regard to the total amount.

Subject to the foregoing, payment of loss shall not reduce liability for other losses whenever sustained.

Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter shall not be cumulative in amount from year to year or from period to period.

If any loss is covered under more than one Insuring Agreement, Coverage the maximum payable for such loss shall not exceed the largest amount available under any one Insuring Agreement.

Coverage.

DISCOVERY

Section 4. This bond applies to loss discovered by the insured during the bond period. Discovery occurs when the insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred, even though the exact amounts or details of loss may not then be known.

Notwithstanding the above, the insured is not liable under this bond for a claim for which the insured is not liable under circumstances which, if true, would create a loss under this bond constitutes such discovery.

NOTICE/PROOF—LEGAL PROCEEDINGS

Section 5.

(A) At the first practicable moment, not to exceed 30 days after the discovery of loss, the insured shall give the Underwriter notice thereof.

(B) Within 6 months after such discovery, the insured shall furnish to the Underwriter proof of loss, duly sworn to, with full particulars of the loss, and shall also submit to the Underwriter copies of all certificates or bond numbers if the Securities were issued therefrom.

(C) Legal proceedings for the recovery of any loss hereunder shall not be a bar to the extension of 90 days after the original date of proof of loss is filed with the Underwriter, or after the expiration of 6 months from the discovery of such loss, except that any action for recovery hereunder on account of any judgments against the insured in any such suit, shall be brought within 24 months from the date upon which the judgment in such suit shall be rendered.

(e) If any limitation embodied in this bond is prohibited by law, such limitation shall be null and void, and the limitation shall be deemed to be amended so as to assure the minimum period of limitation provided by such law.

(f) This bond shall not constitute coverage only in favor of the insured. No suit, action or legal proceedings shall be brought hereunder by any one other than the named insured.

if the insured be a Federal Savings and Loan Association or other state-chartered association insured by the Federal Savings and Loan Insurance Corporation, the insured shall be deemed to have authorized the state supervisory authority in the state in which the insured is located to execute and file this bond, if it is understood and agreed that the insured shall not be covered either by the insured or by the Federal Home Loan Bank, which the insured is a member of, or said Federal Home Loan Bank, which shall give notice thereof to the Underwriter within the time limited, therefore.

Section 6. Any loss of Money, or loss payable in Money, shall be paid, at the option of the insured, in the Money of the country in which the loss was sustained, or in the United States of America dollar equivalent thereof determined at the rate of exchange at the time of payment of such loss.

Securities

The Underwriter shall settle in kind its liability under this bond in the event of a loss of any Securities or at the option of the insured, in cash, for the cost of replacing such Securities, as determined by the market value of such Securities at the time of loss. In case of a loss of subscription, conversion or redemption proceeds, the replacement or loss of Securities, the amount of such loss shall be the amount of such Securities, plus the expiration interest, if such Securities cannot be replaced or have no quoted market value, or if such privileges have no quoted market value, their value shall be determined by agreement of arbitration.

If the applicable coverage of this bond is subject to a Deductible Amount and/or is not sufficient in amount to indemnify the insured for the loss or loss of Securities, the claim is made hereunder for the liability of the Underwriter under this bond for the amount of the loss or the duplication of, so much of such Securities as has

Books of Account and Other Records

In case of loss of, or damage to, any books of account or other records used by the insured in its business, the Underwriter shall pay under this bond only if such books or records are actually produced and then for not more than the cost of the blank book, blank pages or other materials plus the cost of labor for the actual transcription or copying of data which shall have been furnished by the insured in order to reproduce such books and other records.

Property other than Money, Securities or Records
In case of loss of, or damage to, any Property other than Money, Securities, bonds of account or other records, or damage covered under Insuring Agreement (B)(2), the Underwriter shall not be liable for more than the actual cash value of such Property, or of the interest covered under Insuring Agreement (B)(2). The Underwriter may, at its election, pay the actual cash value of, replace or repair such property. Disagreement between the Underwriter and the insured as to the cash value or as to the accuracy of repair or replacement shall be resolved by arbitration.

In witness whereof, the Underwriter has caused this

ASSIGNMENT—SUBROGATION—RECOVERY—COOPERATION

[illegible]

(e) The Insured shall execute all papers and render assistance to secure to the Underwriter the rights and causes of action provided for herein. The Insured shall do nothing after discovery of loss to prejudice such rights and causes of action.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE.

Section 3 of this bond, which is recoverable or subordinated in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor, in interest of the Insured and terminated or canceled or allowed to lapse in which the period of coverage is longer than the period of coverage of this bond, if such is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount claimed hereunder on such loss or the amount payable to the Insured under such other policy or policies, as such loss or the amount payable hereunder exceeds the amount recoverable under such other bonds or policies, for such loss (or for such loss and the amount of the conditions hereof), for any such loss (or the amount of the conditions hereof) shall not exceed the amount of the claim payable hereunder.

If the coverage of this bond supercedes in whole or in part the coverage of any other bond or policy of insurance issued by another insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, everything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 9. Coverage afforded hereunder shall apply only as excess over any valid and collectible insurance or indemnity obtained by the insured, or by any other than the insured, on Property subject to this policy, or by an armored motor vehicle company, or by another person or persons, or by anyone or which employed the person claiming the loss of the messenger conveying the Property.

OWNERSHIP

Section 10. This bond shall apply to loss of Property (1) owned by the insured, (2) held by the insured in any capacity, or (3) for which the insured is legally liable. This bond shall be for the sole use and benefit of the insured named in the Declarations.

DEDUCTIBLE AMOUNT

Section 11. The Underwriter shall be liable hereunder only for the amount by which any loss exceeds the Deductible Amount for the Insuring Agreement of Coverage applicable to such loss, subject to the Limit of Liability for such Agreement of Coverage.

The Insured shall, at the time and in the manner prescribed in this bond, give the Underwriter notice of any loss of the kind covered by the terms of this bond, whether or not the Underwriter is liable therefor, and upon the request of the Underwriter shall file with it a brief statement giving the particulars concerning such loss.

Section 12. This bond shall be deemed terminated or canceled as an entirety—(a) 60 days after the receipt by the insured of a written request from the insured to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the insured to terminate or cancel this bond, or (c) immediately upon the taking over of the insured by a Federal official, or (d) immediately upon the taking over of the insured by another institution. The Underwriter shall, on request, refund to the insured the unearned premium, or the unearned premium less the amount or amount of the premium so terminated or canceled or reduced by notice from, or at the instance of, the Underwriter, or if terminated or canceled as provided in sub-section 11, the unearned premium less the amount of the premium so terminated or canceled or reduced by notice from, or at the instance of, the Underwriter, or if terminated or canceled as provided in sub-section 11, the unearned premium computed at short rates if this bond is terminated or canceled or reduced by notice from, or at the instance of, the Underwriter.

If the Insured be a Federal Savings and Loan Association or state chartered association insured by the Federal Savings and Loan Insurance Corporation, no termination or cancellation of this bond is entirely, whether by the Insured or the Underwriter, shall take effect prior to the expiration of ten days from the receipt by the Federal Home Loan Bank of which the Insured is a member of written notice of such termination or cancellation unless an earlier date of termination or cancellation is agreed upon by said Federal Home Loan Bank.

[illegible]

RIGHTS AFTER TERMINATION OR CANCELATION

one of the following shall terminate the Underwriter's obligation to provide coverage:

- the insured, his successor in business or any other party insured in whole or in part the insurance afforded by this policy, whether or not such other insurance is provided coverage for loss sustained or loss sustained or loss sustained;
- upon any takeover of the insured's business by any State or Federal official or agency, or by any receiver or liquidator, acting or appointed to take over or to liquidate the business of the Underwriter giving notice of such termination in the event that such additional period of time is terminated.

Provided above, the Underwriter shall refund any unearned premium or portion thereof to the insured or his successor in business, or to any receiver or liquidator, acting or appointed to take over or to liquidate the business of the Underwriter for the operation or for the liquidation thereof.

In witness whereof, the Underwriter has caused this bond to be executed on the Declarations page.

Tab 6

| |
|---|
| <p>BANKERS BLANKET BOND Standard Form No. 24, Revised to July, 1980</p> <p style="margin-top: 20px;">Bond No.</p> <p style="margin-top: 20px;">(Herein called Underwriter)</p> <p>DECLARATIONS</p> <p>Item 1. Name of Insured (herein called Insured):</p> <p style="margin-top: 20px;">Principal Address:</p> |
|---|

Item 2. Bond Period: from 12:01 A.M. on (MONTH, DAY, YEAR) to 12:01 A.M. on the effective date of the termination or cancellation of this bond, standard time at the Principal Address as to each of said dates.

Item 3. Limit of Liability and Deductible Amount—
Subject to Sections I and II hereof,
the Limit of Liability is \$ (INSERT AMOUNT) and the Deductible Amount is \$ (INSERT AMOUNT)

Provided, however, that if any amounts are inserted below opposite specified Insuring Agreements or Coverage, those amounts shall be controlling. Any amount set forth below shall be part of and not in addition to amounts set forth above. (If an Insuring Agreement or Coverage is to be deleted, insert "Not Covered.")

Amount applicable to:

| | Limit of Liability | Deductible |
|--|--------------------|------------|
| Insuring Agreement (D) FORGERY OR ALTERATION | \$ | \$ |
| Insuring Agreement (E)— SECURITIES | \$ | \$ |
| Misplacement, Mysterious Unexplainable Disappearance Coverage in Insuring Agreement (B)—ON PREMISES | \$ | \$ |

If "Not Covered" is inserted above opposite any specified Insuring Agreement or Coverage, such Insuring Agreement or Coverage and any other reference thereto in this bond shall be deemed to be deleted therefrom.

Item 4. Offices or Premises Covered—All the Insured's offices or premises in existence at the time this bond becomes effective are covered under this bond except the offices or premises located as follows:

Item 5. The liability of the Underwriter is subject to the terms of the following riders attached hereto:

Item 6. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or canceling prior bond(s) or policy(ies) No.(s) such termination or cancellation to be effective as of the time this bond becomes effective.

TSB 5018C

Printed in U.S.A.

The Underwriter, in consideration of an agreed premium, subject to the Declarations, Insuring Agreements, General Agreements, Conditions and Limitations and other terms hereof, agrees to indemnify the Insured for:

INSURING AGREEMENTS**FIDELITY**

(A) Loss resulting directly from dishonest or fraudulent acts of an Employee committed alone or in collusion with others.

Dishonest or fraudulent acts as used in this Insuring Agreement shall mean only dishonest or fraudulent acts committed by such Employee with the manifest intent.

- (a) to cause the Insured to sustain such loss, and
- (b) to obtain financial benefit for the Employee or for any other person or organization intended by the Employee to receive such benefit other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions or other employee benefits earned in the normal course of employment.

ON PREMISES

- (B) (1) Loss of Property resulting directly from
 - (a) robbery, burglary, misplacement, mysterious unexplainable disappearance and damage thereto or destruction thereof, or
 - (b) theft, false pretenses, common law or statutory larceny, committed by a person present in an office or on the premises of the Insured, while the Property is lodged or deposited within offices or premises located anywhere.
- (2) Loss of or damage to
 - (a) furnishings, fixtures, supplies or equipment within an office of the Insured covered under this bond resulting directly from larceny or

- theft in, or by burglary or robbery of, such office, or attempt thereat, or by vandalism or malicious mischief, or
 - (b) such office resulting from larceny or theft in, or by burglary or robbery of such office or attempt thereat, or to the interior of such office by vandalism or malicious mischief,
- provided that
- (i) the Insured is the owner of such furnishings, fixtures, supplies, equipment, or office or is liable for such loss or damage, and
 - (ii) the loss is not caused by fire.

IN TRANSIT

(C) Loss of Property resulting directly from robbery, common-law or statutory larceny, theft, misplacement, mysterious unexplainable disappearance, being lost or otherwise made away with, and damage thereto or destruction thereof, while the Property is in the custody of a person designated by the Insured to act as its messenger (or a person acting as messenger or custodian during an emergency arising from the incapacity of such designated messenger) and while the Property is in transit anywhere, such transit to begin immediately upon receipt of such Property by said messenger and to end immediately upon delivery to the designated recipient or its agent.

FORGERY OR ALTERATION

(D) Loss resulting directly from

- (1) Forgery or alteration of, on or in any Negotiable Instrument (except an Evidence of Debt, Acceptance, withdrawal order, receipt for the withdrawal of Property, Certificate of Deposit or Letter of Credit)
- (2) transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear a signature which is a Forgery or have been altered without the knowledge and consent of such customer or banking institution. Telegraphic, cable or teletype instructions or advices, as aforesaid, exclusive of transmissions of electronic funds transfer systems, sent by a person other than the said customer or banking institution purporting to send such instructions or advices shall be deemed to bear a signature which is a Forgery.

A mechanically reproduced facsimile signature is treated the same as a hand-written signature.

SECURITIES

(E) Loss resulting directly from the Insured having, in good faith, for its own account or for the account of others.

- (1) acquired, sold or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original
 - (a) Security,
 - (b) Document of Title,
 - (c) deed, mortgage or other instrument conveying title to, or creating or discharging a lien upon, real property,
 - (d) Certificate of Origin or Title,
 - (e) Evidence of Debt,
 - (f) Corporate, partnership or personal Guarantee, or
 - (g) Security Agreement

which

- (i) bears a signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent, registrar, acceptor, surety, guarantor, or of any person signing in any other capacity which is a Forgery, or
- (ii) is altered, or
- (iii) is lost or stolen;
- (2) guaranteed in writing or witnessed any signature upon any transfer, assignment, bill of sale, power of attorney, Guarantee, endorsement or any items listed in (a) through (g) above.
- (3) acquired, sold or delivered, or given value; extended credit or assumed liability, on the faith of, or otherwise acted upon, any item listed in (a) through (d) above which is a Counterfeit.

Actual physical possession of the items listed in (a) through (g) above by the insured, its correspondent bank or other authorized representative, is a condition precedent to the Insured's having relied on the faith of, or otherwise, acted upon, such items.

A mechanically reproduced facsimile signature is treated the same as a handwritten signature.

COUNTERFEIT CURRENCY

(F) Loss resulting directly from the receipt by the Insured, in good faith, of any Counterfeit or altered Money of the United States of America or Canada.

GENERAL AGREEMENTS

NOMINEES

A. Loss sustained by any nominee organized by the Insured for the purpose of handling certain of its business transactions and composed exclusively of its officers, clerks or other employees shall, for all the purposes of this bond and whether or not any partner of such nominee is implicated in such loss, be deemed to be loss sustained by the Insured.

ADDITIONAL OFFICES OR EMPLOYEES—CONSOLIDATION, MERGER OR PURCHASE OF ASSETS—NOTICE

B. If the Insured shall, while this bond is in force, establish any additional offices, other than by consolidation or merger with, or purchase of assets of, another institution, such offices shall be automatically covered hereunder from the date of such establishment without the requirement of notice to the Underwriter or the payment of additional premium for the remainder of the premium period.

If the Insured shall, while this bond is in force, consolidate, or merge with, or purchase assets of, another institution, the Insured shall not have such coverage as is afforded under this bond for loss which

- (a) has occurred or will occur in offices or premises, or
 - (b) has been caused or will be caused by an employee or employees of an institution, or
 - (c) has arisen or will arise out of the assets
- acquired by the Insured as a result of such consolidation, merger or purchase of assets; unless the Insured shall
- (i) give the Underwriter written notice of the proposed consolidation, merger or purchase of assets at least 60 days prior to the proposed effective date of the consolidation, merger or purchase of assets, and
 - (ii) obtain the written consent of the Underwriter to extend the coverage provided by this bond to such additional offices or premises. Employees and other exposures, and

- (iii) pay to the Underwriter an additional premium computed pro rata from the date of such consolidation, merger or purchase of assets to the end of the current premium period.

CHANGE OF CONTROL — NOTICE

C. When the Insured learns of a transfer of its outstanding voting stock which results in a change in control of the Insured, it shall within 30 days give written notice to the Underwriter setting forth

- (a) the names of the transferors and transferees (or the names of the beneficial owners if the shares are registered in another name), and
- (b) the total number of shares owned by the transferors and the transferees (or the beneficial owners), both immediately before and after the transfer, and
- (c) the total number of outstanding shares of voting stock.

As used in this General Agreement, control means the power to determine the management or policy of the Insured by virtue of voting stock ownership. A change in ownership of voting stock which results in direct or indirect ownership by a stockholder or an affiliated group of stockholders of ten per cent (10%) or more of the outstanding voting stock of the Insured shall be presumed to result in a change of control for the purpose of the required notice.

Failure to give the required notice shall result in termination of coverage of this bond, effective upon the date of stock transfer, for any loss in which any transferee is implicated.

WARRANTY

D. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement.

JOINT INSURED

E. If two or more Insureds are covered under this bond, the first named Insured shall act for all Insureds. Payment by the Underwriter to the first named Insured of loss sustained by any Insured shall fully release the Underwriter on account of such loss. If the first named Insured ceases to be covered under this bond, the Insured next named shall thereafter be considered as the named Insured. Knowledge possessed or discovery made by any Insured shall constitute knowledge or discovery by all Insureds for all purposes of this bond. The liability of the Underwriter for loss or losses sustained by all Insureds shall not exceed the amount for which the Underwriter would have been liable had all such loss or losses been sustained by one Insured.

COURT COSTS AND ATTORNEYS' FEES

F. The Underwriter shall indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the insured's liability or alleged liability on account of any loss, claim or damage which, if established against the insured, would constitute a collectible loss under this bond in excess of any Deductible Amount.

The Insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding and at the request of the Underwriter shall furnish it with copies of all pleadings and other papers therein. At the Underwriter's election the insured shall permit the Underwriter to conduct the defense of such suit or legal proceeding, in the Insured's name, through attorneys of the Underwriter's selection. In such event, the Insured shall give all reasonable information and assistance which the Underwriter shall deem necessary to the defense of such suit or legal proceeding.

If the amount of the Insured's liability or alleged liability is greater than the amount recoverable under this bond, or if a Deductible Amount is applicable, or both, the liability of the Underwriter under this General Agreement is limited to the proportion of court costs and attorneys' fees incurred and paid by the Insured or by the Underwriter that the amount recoverable under this bond bears to the total of such amount plus the amount which is not so recoverable. Such indemnity shall be a part of the Limit of Liability for the applicable Insuring Agreement or Coverage.

If the Underwriter pays court costs and attorneys' fees in excess of its proportionate share of such costs and fees, the Insured shall promptly reimburse the Underwriter for such excess.

CONDITIONS AND LIMITATIONS

DEFINITIONS

Section 1. As used in this bond:

(a) Acceptance means a draft which the drawee has, by signature written thereon, engaged to honor as presented.

(b) Certificate of Deposit means an acknowledgment in writing by a financial institution of receipt of Money with an engagement to repay it.

(c) Certificate of Origin or Title means a document issued by a manufacturer of personal property or a governmental agency evidencing the ownership of the personal property and by which ownership is transferred.

(d) Counterfeit means an imitation which is intended to deceive and to be taken as an original.

(e) Document of Title means a bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers and must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(f) Employee means

- (1) an officer or other employee of the Insured, while employed in, at, or by any of the Insured's offices or premises covered hereunder, and a guest student pursuing studies or duties in any of said offices or premises;
- (2) an attorney retained by the Insured and an employee of such attorney while either is performing legal services for the Insured;
- (3) a person provided by an employment contractor to perform employee duties for the Insured under the Insured's supervision at any of the Insured's offices or premises covered hereunder;
- (4) an employee of an institution merged or consolidated with the Insured prior to the effective date of this bond; and
- (5) each natural person, partnership or corporation authorized by the Insured to perform services as data processor of checks or other accounting records of the Insured, herein called Processor. (Each such Processor, and the partners, officers and employees of such Processor shall, collectively, be deemed to be one Employee for all the purposes of this bond, excepting, however, the second paragraph of Section 12. A Federal Reserve Bank or clearing house shall not be construed to be a processor.)

(g) Evidence of Debt means an instrument, including a Negotiable Instrument,

executed by a customer of the Insured and held by the Insured which in the regular course of business is treated as evidencing the customer's debt to the Insured.

(h) Forgery means the signing of the name of another with intent to deceive; it does not include the signing of one's own name with or without authority, in any capacity, for any purpose.

(i) Guarantee means a written undertaking obligating the signer to pay the debt of another to the Insured or its assignee or to a financial institution from which the Insured has purchased participation in the debt, if the debt is not paid in accordance with its terms.

(j) Letter of Credit means an engagement in writing by a bank or other person made at the request of a customer and the bank or other person will honor drafts or other demands for payment upon compliance with the conditions specified in the Letter of Credit.

(k) Money means a medium of exchange in current use authorized or adopted by a domestic or foreign government as a part of its currency.

(l) Negotiable Instrument means any writing

- (1) signed by the maker or drawer; and
- (2) containing an unconditional promise or order to pay a sum certain in Money and no other promise, order, obligation or power given by the maker or drawer; and
- (3) is payable on demand or at a definite time; and
- (4) is payable to order or bearer.

(m) Property means Money, Securities, Negotiable Instruments, Certificates of Deposit, Documents of Title, Acceptances, Evidences of Debt, Security Agreements, withdrawal orders, Certificates of Origin or Title, Letters of Credit, insurance policies, abstracts of title, deeds and mortgages on real estate, revenue and other stamps, tokens, unsold state lottery tickets, books of account and other records whether recorded in writing or electrically, gems, jewelry, precious metals in bars or ingots, and tangible items of personal property which are not hereinbefore enumerated.

(n) Security means an instrument which

- (1) is issued in bearer or registered form; and
- (2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and
- (3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and
- (4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(o) Security Agreement means an agreement which creates an interest in personal property or fixtures and which secures payment or performance of an obligation.

EXCLUSIONS

Section 2. This bond does not cover:

(a) loss resulting directly or indirectly from Forgery or alteration, except when covered under Insuring Agreements (A), (D), (E) or (F);

(b) loss due to riot or civil commotion outside the United States of America and Canada; or loss due to military, naval or usurped power, war or insurrection unless such loss occurs in transit in the circumstances recited in Insuring Agreement (C), and unless, when such transit was initiated, there was no knowledge of such riot, civil commotion, military, naval or usurped power, war or insurrection on the part of any person acting for the Insured in initiating such transit;

(c) loss resulting directly or indirectly from the effects of nuclear fission or fusion or radioactivity; provided, however, that this paragraph shall not apply to loss resulting from industrial uses of nuclear energy;

(d) loss resulting directly or indirectly from any acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee duly elected or appointed by resolution of the board of directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured;

(e) loss resulting directly or indirectly from the complete or partial non-payment of, or default upon, any loan or transaction in the nature of a loan or extension of credit, whether involving the Insured as a lender or as a borrower, including the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or Evidences of Debt, whether such loan or transaction was procured in good faith or through trick artifice, fraud or false pretenses, except when covered under Insuring Agreements (A), (D) or (E).

(f) loss of Property contained in customers' safe deposit boxes, except when the Insured is legally liable therefor and the loss is covered under Insuring Agreement (A);

(g) loss through cashing or paying forged or altered travelers' checks or travelers' checks bearing forged endorsements, except when covered under Insuring Agreement (A); or loss of unsold travelers' checks or unsold money orders placed in the custody of the Insured with authority to sell, unless (a) the Insured is legally liable for such loss and (b) such checks or money orders are later paid or honored by the drawer thereof, except when covered under Insuring Agreement (A);

(h) loss caused by an Employee, except when covered under Insuring Agreement (A);

(i) loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer's account, actual or fictitious, and notwithstanding any act or omission on the part of any Employee in connection with any account relating to such trading, indebtedness or balance, except when covered under Insuring Agreements (D) and (E);

(j) shortage in any teller's cash due to error, regardless of the amount of such shortage; and any shortage in any teller's cash which is not in excess of the normal shortage in the tellers' cash in the office where such shortage shall occur shall be presumed to be due to error.

(k) loss resulting directly or indirectly from the use of credit, debit, charge, access, convenience, identification or other cards.

(1) in obtaining credit, or

(2) in gaining access to automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, or

(3) in gaining access to point of sale terminals, customer-bank communication terminals, or similar electronic terminals of electronic funds transfer systems,

whether such cards were issued, or purport to have been issued, by the insured or by anyone other than the Insured, except when covered under Insuring Agreement (A);

(l) loss involving automated mechanical devices which, on behalf of the Insured, disburse Money, accept deposits, cash checks, drafts or similar written instruments or make credit card loans, unless such automated mechanical devices are situated within

an office of the Insured which is permanently staffed by an Employee whose duties are those usually assigned to a bank teller, even though public access is from outside the confines of such office, but in no event shall the Underwriter be liable for loss (including loss of Property)

- (1) as a result of damage to such automated mechanical devices from vandalism or malicious mischief perpetrated from outside such office, or
- (2) as a result of failure of such automated mechanical devices to function properly, or
- (3) through misplacement or mysterious unexplainable disappearance while such Property is located within any such automated mechanical devices, except when covered under Insuring Agreement (A);

(m) loss through the surrender of Property away from an office of the insured as a result of a threat

- (1) to do bodily harm to any person, except loss of Property in transit in the custody of any person acting as messenger provided that when such transit was initiated there was no knowledge by the Insured of any such threat, or
- (2) to do damage to the premises or property of the Insured, except when covered under Insuring Agreement (A);

(n) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving erroneous credits to such account, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the Insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A);

(o) loss resulting directly or indirectly from payments made or withdrawals from a depositor's account involving items of deposit which are not finally paid for any reason, including but not limited to Forgery or any other fraud, unless such payments or withdrawals are physically received by such depositor or representative of such depositor who is within the office of the Insured at the time of such payment or withdrawal, or except when covered under Insuring Agreement (A);

(p) Loss resulting directly or indirectly from counterfeiting, except when covered under Insuring Agreements (A), (E) or (F);

(q) loss of any tangible item of personal property which is not specifically enumerated in the paragraph defining Property and for which the Insured is legally liable, if such property is specifically Insured by other insurance of any kind and in any amount obtained by the Insured, and in any event, loss of such property occurring more than 60 days after the Insured shall have become aware that it is liable for the safekeeping of such property, except when covered under Insuring Agreements (A or (B)(2);

(r) loss or loss of Property in or from an office or premises listed in Item 4 of the Declarations;

(s) loss of Property while in the mail or with a carrier for hire (other than an armored motor vehicle company), except when covered under Insuring Agreement (A);

(t) potential income, including but not limited to interest and dividends, not realized by the Insured;

(u) damages of any type for which the Insured is legally liable, except direct compensatory damages arising from a loss covered under this bond;

(v) costs, fees and other expenses incurred by the Insured in establishing the existence of or amount of loss covered under this bond;

(w) indirect or consequential loss of any nature.

LIMIT OF LIABILITY/NON-ACCUMULATION OF LIABILITY

Section 3. The total liability of the Underwriter under this bond on account of loss, including court costs and attorneys' fees.

- (a) caused by any one act of burglary, robbery or attempt thereof, in which no Employee is implicated, or
- (b) with respect to any one unintentional or negligent act or omission on the part of any person (whether an Employee or not) resulting in damage to or destruction or misplacement of Property, or
- (c) other than those specified in (a) and (b) preceding, caused by all acts or omissions by any person (whether an Employee or not) or all acts or omissions in which such person is implicated, or
- (d) other than those specified in (a), (b) and (c) preceding, resulting from any one casualty or event,

is limited to the Limit of Liability stated in Item 3 of the Declarations of this bond or amendment thereto or to the amount of the applicable coverage, if such amount be smaller, without regard to the total amount of such loss.

Subject to the foregoing, payment of loss shall not reduce liability for other losses whenever sustained.

Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter shall not be cumulative in amounts from year to year or from period to period.

If any loss is covered under more than one Insuring Agreement or Coverage the maximum payable for such loss shall not exceed the largest amount available under any one Insuring Agreement or Coverage.

DISCOVERY

Section 4. This bond applies to loss discovered by the Insured during the bond period. Discovery occurs when the Insured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the bond has been or will be incurred, even though the exact amount or details of loss may not then be known.

Notice to the Insured of an actual or potential claim by a third party which alleges that the Insured is liable under circumstances which, if true, would create a loss under this bond constitutes such discovery.

NOTICE/PROOF — LEGAL PROCEEDINGS**Section 5.**

(a) At the earliest practicable moment, not to exceed 30 days, after discovery of loss, the Insured shall give the Underwriter notice thereof.

(b) Within 6 months after such discovery, the Insured shall furnish to the Underwriter proof of loss, duly sworn to, with full particulars.

(c) Lost Securities listed in a proof of loss shall be identified by certificate or bond numbers if the Securities were issued therewith.

(d) Legal proceedings for the recovery of any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is filed with the Underwriter or after the expiration of 24 months from the discovery of such loss, except that any action or proceeding to recover hereunder on account of any judgment against the Insured in any suit mentioned in General Agreement F, or to recover attorneys' fees paid in any such suit, shall be brought within 24 months from the date upon which the judgment and such suit shall become final.

(e) If any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to equal the minimum period of limitation provided by such law.

(f) This bond affords coverage only in favor of the Insured. No suit, action or legal proceedings shall be brought hereunder by any one other than the named Insured.

VALUATION

Section 6.

Any loss of Money, or loss payable in Money, shall be paid, at the option of the Insured, in the Money of the country in which the loss was sustained or in the United States of America dollar equivalent thereof determined at the rate of exchange at the time of payment of such loss.

Securities

The Underwriter shall settle in kind its liability under this bond on account of a loss of any Securities or, at the option of the Insured, shall pay to the Insured the cost of replacing such Securities, determined by the market value thereof at the time of such settlement. In case of a loss of subscription, conversion or redemption privileges through the misplacement or loss of Securities, the amount of such loss shall be the value of such privileges immediately preceding the expiration thereof. If such Securities cannot be replaced or have no quoted market value, or if such privileges have no quoted market value, their value shall be determined by agreement or arbitration.

If the applicable coverage of this bond is subject to a Deductible Amount and/or is not sufficient in amount to indemnify the Insured in full for the loss of Securities for which claim is made hereunder, the liability of the Underwriter under this bond is limited to the payment for, or the duplication of, so much of such Securities as has a value equal to the amount of such applicable coverage.

Books of Account and Other Records

In case of loss of, or damage to, any books of account or other records used by the Insured in its business, the Underwriter shall be liable under this bond only if such books or records are actually reproduced and then for not more than the cost of labor for the actual blank pages or other materials plus the cost of labor for the actual transcription or copying of data which shall have been furnished by the Insured in order to reproduce such books and other records.

Property other than Money, Securities or Records

In case of loss of, or damage to, any Property other than Money, Securities, books of account or other records, or damage covered under Insuring Agreement (B)(2), the Underwriter shall not be liable for more than the actual cash value of such Property, or of items covered under Insuring Agreement (B)(2). The Underwriter may, at its election, pay the actual cash value of, replace or repair such property. Disagreement between the Underwriter and the Insured as to the cash value or as to the adequacy of repair or replacement shall be resolved by arbitration.

ASSIGNMENT — SUBROGATION — RECOVERY — COOPERATION

Section 7.

(a) In the event of payment under this bond, the Insured shall deliver, if so requested by the Underwriter, an assignment of such of the Insured's rights, title and interest and causes of action as it has against any person or entity to the extent of the loss payment.

(b) In the event of payment under this bond, the Underwriter shall be subrogated to the Insured's rights of recovery therefor against any person or entity to the extent of such payment.

(c) Recoveries, whether effected by the Underwriter or by the Insured, shall be

applied net of the expense of such recovery first to the satisfaction of the Insured's loss in excess of the amount paid under this bond, secondly, to the Underwriter as reimbursement of amounts paid in settlement of the Insured's claim, and thirdly, to the Insured in satisfaction of any Deductible Amount. Recovery on account of loss of Securities as set forth in the second paragraph of Section 6 or recovery from reinsurance and/or indemnity of the Underwriter shall not be deemed a recovery as used herein.

(d) Upon the Underwriter's request and at reasonable times and places designated by the Underwriter the Insured shall

- (1) submit to examination by the Underwriter and subscribe to the same under oath; and
- (2) produce for the Underwriter's examination all pertinent records; and
- (3) cooperate with the Underwriter in all matters pertaining to the loss.

(e) The Insured shall execute all papers and render assistance to secure to the Underwriter the rights and causes of action provided for herein. The Insured shall do nothing after discovery of loss to prejudice such rights or causes of action.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

Section 8. With respect to any loss set forth in subsection (c) of Section 3 of this bond which is recoverable or recovered in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried hereunder on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss if the latter amount be the larger.

If the coverage of this bond supersedes in whole or in part the coverage of any other bond or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 9. Coverage afforded hereunder shall apply only as excess over any valid and collectible insurance or indemnity obtained by the Insured, or by one other than the Insured on Property subject to exclusion (q), or by an armored motor vehicle company, or by another entity on whose premises the loss occurred or which employed the person causing the loss or the messenger conveying the Property involved.

OWNERSHIP

Section 10. This bond shall apply to loss of Property (1) owned by the Insured, (2) held by the Insured in any capacity, or (3) for which the Insured is legally liable. This bond shall be for the sole use and benefit of the Insured named in the Declarations.

DEDUCTIBLE AMOUNT

Section 11. The Underwriter shall be liable hereunder only for the amount by which any loss exceeds the Deductible Amount for the Insuring Agreement or Coverage applicable to such loss, subject to the Limit of Liability for such Agreement or Coverage.

The Insured shall, in the time and in the manner prescribed in this bond, give the Underwriter notice of any loss of the kind covered by the terms of this bond, whether or not the Underwriter is liable therefor, and upon the request of the Underwriter shall file with it a brief statement giving the particulars concerning such loss.

TERMINATION OR CANCELLATION

Section 12. This bond shall be deemed terminated or canceled as an entirety— (a) 60 days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the Insured to terminate or cancel this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution. The Underwriter shall, on request, refund to the Insured the unearned premium, computed pro rata, if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Underwriter, or if terminated or canceled as provided in sub-section (c) or (d) of this paragraph. The Underwriter shall refund to the Insured the unearned premium computed at short rates if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Insured.

This bond shall be deemed terminated or canceled as to any Employee or any partner, officer or employee of any Processor— (a) as soon as any Insured, or any director or officer not in collusion with such person, shall learn of any dishonest or fraudulent act committed by such person at any time against the Insured or any other person or entity, without prejudice to the loss of any Property then in transit in the custody of such person, or (b) 15 days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond as to such person.

Termination of the bond as to any Insured terminates liability for any loss sustained by such Insured which is discovered after the effective date of such termination.

RIGHTS AFTER TERMINATION OR CANCELLATION

Section 13. At any time prior to the termination or cancellation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of 12 months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancellation and shall pay all additional premium therefor.

Upon receipt of such notice from the Insured, the Underwriter shall give its written consent thereto; provided, however, that such additional period of time shall terminate immediately

- (a) on the effective date of any other insurance obtained by the Insured, its successor in business or any other party, replacing in whole or in part the insurance afforded by this bond, whether or not such other insurance provides coverage for loss sustained prior to its effective date, or
- (b) upon any takeover of the Insured's business by any State or Federal official or agency, or by any receiver or liquidator, acting or appointed for this purpose

without the necessity of the Underwriter giving notice of such termination. In the event that such additional period of time is terminated, as provided above, the Underwriter shall refund any unearned premium.

The right to purchase such additional period for the discovery of loss may not be exercised by any State or Federal official or agency, or by any receiver or liquidator, acting or appointed to take over the Insured's business for the operation or for the liquidation thereof or for any other purpose.

In witness whereof, the Underwriter has caused this bond to be
executed on the Declarations page.

SPECIMEN

Tab 7

| | |
|---|--|
| BANKERS BLANKET BOND Standard Form No. 24, Revised to April, 1969 | |
| Bond No. | |
| (Herein called Underwriter) | |
| DECLARATIONS | |
| Item 1. Name of Insured (herein called Insured) | |
| Principal Address: | |
| (NO. STREET, CITY, STATE) | |

Item 2. Bond Period: from noon on _____ MONTH, DAY, YEAR to noon on the effective date of the termination or cancellation of this bond, standard time at the Principal Address as to each of said dates.

Item 3. Limit of Liability
 Subject to Section 7 hereof, the Limit of Liability \$
 Provided, however, that if any lesser amounts are inserted below opposite specified Insuring Agreements or Coverage, such lesser amounts shall be part of and not in addition to such Limit of Liability.

Amount applicable to:

\$
\$
\$

(Insert Descriptive Title of Insuring Agreement or Misplacement, Mysterious, Unexplained Disappearance Coverage in Insuring Agreement 8.)

If "Nil", "Not Covered" or equivalent is inserted above opposite any specified Insuring Agreement or Coverage, such Insuring Agreement or Coverage and any other reference thereto in this bond shall be deemed to be deleted therefrom.

Item 4. Offices Covered—

All the Insured's offices in existence at the time this bond becomes effective are covered under this bond except the offices located as follows:

Item 5. The liability of the Underwriter is subject to the terms of the following riders attached hereto:

Item 6. The Insured by the acceptance of this bond gives notice to the Underwriter terminating or cancelling prior bond(s) or policy(ies) No.(s) such termination or cancellation to be effective as of the time this bond becomes effective.

TSB 5018b

Printed in U.S.A.

The Underwriter, in consideration of an agreed premium, and subject to the Declarations made a part hereof, the General Agreements, Conditions and Limitations and other terms of this bond, agrees with the Insured, in accordance with the Insuring Agreements hereof to which an amount of insurance is applicable as set forth in Item 3 of the Declarations and with respect to loss sustained by the Insured at any time but discovered during the Bond Period, to indemnify and hold harmless the Insured for:

INSURING AGREEMENTS

FIDELITY

(A) Loss through any dishonest or fraudulent act of any of the Employees, committed anywhere and whether committed alone or in collusion with others, including loss, through any such act of any of the Employees, of Property held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured is liable therefor.

ON PREMISES

(B) Loss of Property (occurring with or without negligence or violence) through robbery, burglary, common-law or statutory larceny, theft, false pretenses, hold-up, misplacement, mysterious unexplainable disappearance, damage thereto or destruction thereof, and loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is, or is supposed to be, lodged or deposited within any offices or premises located anywhere, except in an office listed in Item 4 of the Declarations or amendment thereof or in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation.

Loss of any of the items of property enumerated in the paragraph defining Property, in the possession of any customer of the Insured or of any representative of such customer, whether or not the Insured is liable for the loss thereof,

- (a) through any hazard specified in the preceding paragraph, while such property is within any of the Insured's offices covered hereunder, or
- (b) through robbery or hold-up while such customer or representative is actually transacting business with the Insured at an outside window or other similar facility offered to the public for that purpose by the Insured, and attended by an Employee of the Insured, at any of the Insured's offices covered hereunder or

(c) through robbery or hold-up during banking hours while such customer or representative is in any building or on any driveway, parking lot or similar facility maintained by the Insured as a convenience for such customers or representatives using motor vehicles if such customer or representative is present in such building or on such facility for the purpose of transacting banking business with the Insured, at any of the Insured's offices covered hereunder; provided such loss, at the option of the Insured, is included in the Insured's proof of loss, and excluding, in any event, loss caused by such customer or any representative of such customer.

Offices and Equipment

(a) Loss of, or damage to, furnishings, fixtures, stationery, supplies or equipment within any of the Insured's offices covered under this bond caused by larceny or theft in, or by burglary, robbery or hold-up of, such office, or attempt thereat, or by vandalism or malicious mischief, or (b) loss through damage to any such office by larceny or theft in, or by burglary, robbery or hold-up of, such office or attempt thereat, or to the interior of any such office by vandalism or malicious mischief, provided, in any event, that the Insured is the owner of such offices, furnishings, fixtures, stationery, supplies or equipment or is liable for such loss or damage, always excepting, however, all loss or damage through fire.

IN TRANSIT

(C) Loss of Property (occurring with or without negligence or violence) through robbery, common-law or statutory larceny, theft, hold-up, misplacement, mysterious unexplainable disappearance, being lost or otherwise made away with, damage thereto or destruction thereof, and loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of Property, while the Property is in transit anywhere in the custody of any person or persons acting as messenger, except while in the mail or with a carrier for hire, other than an armored motor vehicle company, for the purpose of transportation, such transit to begin immediately upon receipt of such Property by the transporting person or persons, and to end immediately upon delivery thereof at destination.

FORGERY OR ALTERATION

(D) Loss through FORGERY OR ALTERATION of, on or in any checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds or Property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasuries; or loss (1) through transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices directed to the Insured and authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution (telegraphic, cable or teletype instructions or advices, as aforesaid, sent by a person other than the said customer or banking institution purporting to send such instructions or advices shall be deemed to bear a forged signature), or (2) through the payment by the Insured of promissory notes which are payable at the Insured or which are or purport to be notes payable at the Insured under instructions of any depositor, thereof, and which are actually paid by the Insured out of funds on deposit with it, and which prove to be forged or altered or which bear forged endorsements.

Any check or draft (a) made payable to a fictitious payee and endorsed in the

name of such fictitious payee or (b) procured in a face to face transaction with the maker or drawer thereof or with one acting as agent of such maker or drawer by anyone impersonating another and made or drawn payable to the one so impersonated and endorsed by anyone other than the one impersonated, shall be deemed to be forged as to such endorsement.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

SECURITIES

(E) Loss (1) through the Insured's having, in good faith and in the course of business, whether for its own account or for the account of others, in any representative, fiduciary, agency or any other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon, any securities, documents or other written instruments which prove to have been

- (a) counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity; or
- (b) raised or otherwise altered or lost or stolen, or

(2) through the Insured's having, in good faith and in the course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is ultra vires the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents upon or in connection with any securities, obligations or other written instruments and which purport to pass title to such securities, obligations or other written instruments; EXCLUDING, in any event, loss through FORGERY OR ALTERATION of, on or in any checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds or Property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasuries; and excluding, further, loss specified in subdivisions (1) and (2) of Insuring Agreement (D) as printed in this bond, whether or not any amount of insurance is applicable under this bond to Insuring Agreement (D).

Securities, documents or other written instruments shall be deemed to mean

- (a) original (including original counterparts) negotiable or non-negotiable agreements in writing, other than as set forth in (b) and (c) below, having value which value is, in the ordinary course of business, transferable by delivery of such agreements with any necessary endorsement or assignment;
- (b) a carbon copy of a bill of lading provided that the signature on such carbon copy of such bill of lading is an original signature or is a carbon copy impression of a signature, or
- (c) original corporate, partnership or personal guarantees.

Actual physical possession of such securities, documents or other written instruments by the Insured, its correspondent bank or other authorized representative is a condition precedent to the Insured's having relied on the faith of, or otherwise acted upon, such securities, documents or other written instruments.

The word "counterfeited" as used in this Insuring Agreement shall be deemed to mean only an imitation of a security, document or other written instrument, as set forth in (a) above, which is intended to deceive and to be taken for an original.

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures.

REDEMPTION OF UNITED STATES SAVINGS BONDS

(F) Loss through the Insured's paying or redeeming, or guaranteeing or witnessing any signature upon, any United States Savings Bonds, Series A to K inclusive, United States Savings Notes or Armed Forces Leave Bonds which shall have been forged, counterfeited, raised or otherwise altered, or lost or stolen, or on which the signature to the Request for Payment shall have been forged.

COUNTERFEIT CURRENCY

(G) Loss through the receipt by the Insured, in good faith, of any counterfeited or altered paper currencies or coin of the United States of America or Canada issued or purporting to have been issued by the United States of America or Canada or issued pursuant to a United States of America or Canadian Statute for use as currency.

GENERAL AGREEMENTS**NOMINEES**

A. Loss sustained by any nominee organized by the Insured for the purpose of handling certain of its business transactions and composed exclusively of its officers, clerks or other employees shall, for all the purposes of this bond and whether or not any partner of such nominee is concerned or implicated in such loss, be deemed to be loss sustained by the Insured.

ADDITIONAL OFFICES OR EMPLOYEES**CONSOLIDATION OR MERGER**

B. If the Insured shall, while this bond is in force, establish any additional office or offices, such office or offices shall be automatically covered hereunder from the dates of their establishment, respectively. No notice to the Underwriter of an increase during any premium period in the number of offices or in the number of Employees at any of the offices covered hereunder need be given and no additional premium need be paid for the remainder of such premium period, unless such increase shall result from the Insured's consolidation or merger with, or purchase of assets of, another institution.

WARRANTY

C. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement.

COURT COSTS AND ATTORNEYS' FEES

(Applicable to all Insuring Agreements now or hereafter forming part of this bond)

D. The Underwriter will indemnify the Insured against court costs and reasonable attorneys' fees incurred and paid by the Insured in defending any suit or legal proceeding brought against the Insured to enforce the Insured's liability or alleged liability on account of any loss, claim or damage which, if established against the Insured, would constitute a valid and collectible loss sustained by the Insured under the terms of this bond. In the event such loss, claims or damage is subject to a Deductible Amount, this paragraph shall not apply to any such loss, claim or damage equal to or less than such Deductible Amount, but if such loss, claim or damage is greater than such Deductible Amount, the liability of the Underwriter under this paragraph is limited to the proportion of the Court Costs and Attorneys' Fees incurred and paid by the Insured that the amount of such loss, claim or damage which, if established against the Insured, would be recoverable under this bond, bears to the

sum of such amount and such Deductible Amount. Such indemnity shall be in addition to the amount of this bond. In consideration of such indemnity, the insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding; at the request of the Underwriter shall furnish it with copies of all pleadings and other papers therein; and at the Underwriter's election shall permit the Underwriter to conduct the defense of such suit or legal proceeding, in the Insured's name, through attorneys of the Underwriter's own selection. In the event of such election by the Underwriter, the Insured shall give all reasonable information and assistance, other than pecuniary, which the Underwriter shall deem necessary to the proper defense of such suit or legal proceeding.

THE FOREGOING INSURING AGREEMENTS AND GENERAL
AGREEMENTS ARE SUBJECT TO THE FOLLOWING
CONDITIONS AND LIMITATIONS:

DEFINITIONS

Section 1. The following terms, as used in this bond, shall have the respective meanings stated in this Section:

(a) **"Employee"** means one or more of the Insured's officers, clerks and other employees while employed in, at or by any of the Insured's offices while covered under this bond and one or more of the officers, clerks and other employees of any predecessor of the Insured whose principal assets are acquired by the Insured by consolidation or merger with, or purchase of assets of such predecessor, and attorneys retained by the Insured to perform legal services for the Insured and the employees of such attorneys while such attorneys or the employees of such attorneys are performing such services for the Insured, and Guest Students pursuing their studies or duties in any of said offices.

Each natural person, partnership or corporation authorized by written agreement with the Insured to perform services as electronic data processor of checks or other accounting records of the Insured, herein called Processor, shall, while performing such services, be deemed to be an Employee as defined in the preceding paragraph. Each such Processor and the partners, officers and employees of such Processor shall, collectively, be deemed to be one Employee for all the purposes of this bond; excepting, however, the second paragraph of Section 11.

(b) **"Property"** means money (i.e., currency, coin, bank notes, Federal Reserve notes), postage and revenue stamps, U.S. Savings Stamps, bullion, precious metals of all kinds and in any form and articles made therefrom, jewelry, watches, necklaces, bracelets, precious and semi-precious stones, bonds, securities, evidences of debts, debentures, scrip, certificates, receipts, warrants, rights, transfers, coupons, drafts, bills of exchange, acceptances, notes, checks, withdrawal orders, money orders, travelers' letters of credit, bills of lading, abstracts of title, insurance policies, deeds, mortgages upon real estate and or upon chattels and upon interests therein, and assignments of such policies, mortgages and instruments, and other valuable papers, including books of account and other records used by the Insured in the conduct of its business, and all other instruments similar to or in the nature of the foregoing, in which the Insured has an interest or in which the Insured acquired or should have acquired an interest by reason of a predecessor's declared financial condition at the time of the Insured's consolidation or merger with, or purchase of the principal assets of, such predecessor or which are held by the Insured for any purpose or in any capacity and whether so held gratuitously or not and whether or not the Insured

is liable therefor, and chattels which are not hereinbefore enumerated and for which the Insured is legally liable.

EXCLUSIONS

Section 2. THIS BOND DOES NOT COVER:

(a) loss effected directly or indirectly by means of forgery or alteration of, on or in any instrument, except when covered by Insuring Agreement (A), (D), (E), (F) or (G).

(b) loss due to riot or civil commotion outside the United States of America and Canada; or loss due to military, naval or usurped power, war or insurrection unless such loss occurs in transit in the circumstances recited in Insuring Agreement (C), and unless, when such transit was initiated, there was no knowledge of such riot, civil commotion, military, naval or usurped power, war or insurrection on the part of any person acting for the Insured in initiating such transit.

(c) loss, in time of peace or war, directly or indirectly caused by or resulting from the effects of nuclear fission or fusion or radioactivity; provided, however, that this paragraph shall not apply to loss resulting from industrial uses of nuclear energy.

(d) loss resulting from any act or acts of any director of the Insured other than one employed as a salaried, pensioned or elected official or an Employee of the Insured, except when performing acts coming within the scope of the usual duties of an Employee, or while acting as a member of any committee elected or appointed by resolution of the board of directors of the Insured to perform specific, as distinguished from general, directorial acts on behalf of the Insured.

(e) loss resulting from the complete or partial non-payment of, or default upon,

(1) any loan or transaction in the nature of, or amounting to, a loan made by or obtained from the Insured, or

(2) any note, account, agreement or other evidence of debt assigned or sold to, or discounted or otherwise acquired by, the Insured whether procured in good faith or through trick, artifice, fraud or false pretenses unless such loss is covered under Insuring Agreement (A), (D) or (E); or loss resulting from payments made or withdrawals from any depositor's account by reason of uncollected items of deposit having been credited by the Insured to such account, unless such payments are made to, or withdrawn by, such depositor or representative of such depositor who is within the office of the Insured at the time of such payment or withdrawal, or unless such loss is covered under Insuring Agreement (A).

(f) loss of Property contained in customers' safe deposit boxes unless such loss be sustained through any dishonest or fraudulent act of an Employee in such circumstances as shall make the Insured legally liable therefor.

(g) loss through cashing or paying forged or altered travelers' checks or travelers' checks bearing forged endorsements, in whatsoever form drawn, unless fraud or dishonesty on the part of any of the Employees is involved; or loss of unsold travelers' checks placed in the custody of the Insured with authority to sell, where no fraud or dishonesty on the part of any of the Employees is involved, unless (a) the Insured is legally liable for such loss of such checks and (b) such checks are later paid or honored by the drawer thereof.

(h) loss of Property or loss of privileges through the misplacement or loss of Property as set forth in Insuring Agreement (B) or (C) while the Property is in the custody of any armored motor vehicle company, unless such loss shall be in excess of the amount recovered or received by the Insured under (a) the Insured's contract with said armored motor vehicle company, (b) insurance carried by said armored motor vehicle company for the benefit of users of its service, and (c) all other insur-

ance and indemnity in force in whatsoever form carried by or for the benefit of users of said armored motor vehicle company's service, and then this bond shall cover only such excess.

(f) loss of any chattel which is not specifically enumerated in the paragraph defining Property and for which the Insured is legally liable, if such chattel be specifically insured by other insurance of any kind and in any amount effected by the Insured. If any such chattel be insured by other insurance effected by one other than the Insured, this bond shall be only excess over such other insurance. This bond does not cover, in any event, any loss of any such chattel occurring more than sixty days after the Insured shall have become aware that it is liable for the safekeeping of such chattel. Nothing in this subsection shall apply to the loss of any such chattel when covered by Insuring Agreement (A) or by the third paragraph of Insuring Agreement (B).

(g) shortage in any teller's cash due to error, regardless of the amount of such shortage; and any shortage in any teller's cash which is not in excess of the normal shortage in the tellers' cash in the office where such shortage shall occur shall be assumed to be due to error.

(k) any person, who is a partner, officer or employee of any Processor covered under this bond, from and after the time that the Insured or any partner or officer thereof not in collusion with such person shall have knowledge or information that such person has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the time this bond is effective.

ASSIGNMENT OF RIGHTS

Section 3. This bond does not afford coverage in favor of any Processor, as aforesaid, and upon payment to the Insured by the Underwriter on account of any loss through fraudulent or dishonest acts committed by any of the partners, officers or employees of such Processor, whether acting alone or in collusion with others, an assignment of such of the Insured's rights and causes of action as it may have against such Processor by reason of such acts so committed shall, to the extent of such payment, be given by the Insured to the Underwriter, and the Insured shall execute all papers necessary to secure to the Underwriter the rights herein provided for.

LOSS—NOTICE—PROOF—LEGAL PROCEEDINGS

Section 4. This bond is for the use and benefit only of the Insured named in the Declarations and the Underwriter shall not be liable hereunder for loss sustained by anyone other than the Insured unless the Insured, in its sole discretion and at its option, shall include such loss in the Insured's proof of loss. At the earliest practicable moment after discovery of any loss hereunder the Insured shall give the Underwriter written notice thereof and shall also within six months after such discovery furnish to the Underwriter affirmative proof of loss with full particulars. Legal proceedings for recovery of any loss hereunder shall not be brought prior to the expiration of sixty days after such proof of loss is filed with the Underwriter nor after the expiration of twenty-four months from the discovery of such loss, except that any action or proceeding to recover hereunder on account of any judgment against the Insured in any suit mentioned in General Agreement D or to recover attorneys' fees paid in any such suit, shall be begun within twenty-four months from the date upon which the judgment in such suit shall become final. If any limitation embodied in this bond is prohibited by any law controlling the construction hereof, such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

VALUATION

Securities

Section 5.

The Underwriter shall settle in kind its liability under this bond on account of a loss of any securities, or at the option of the Insured shall pay to the Insured the cost of replacing such securities, determined by the market value thereof at the time of such settlement. In case of a loss of subscription, conversion, redemption or deposit privileges, as above set forth, the amount of such loss shall be the value of such privileges immediately preceding the expiration thereof. If such securities cannot be replaced or have no quoted market value, or if such privileges have no quoted market value, their value shall be determined by agreement or arbitration. Any loss under this bond of currency or funds of any country shall be paid in the currency or funds of such country or, at the option of the Insured, in the United States of America dollar equivalent thereof determined by the rate of exchange at the time of the payment of such loss. Any other loss sustained at any of the Insured's offices covered under this bond and payable in money shall be paid in the currency or funds of the country in which such office is located or, at the option of the Insured, in the United States of America dollar equivalent thereof determined by the rate of exchange at the time of the payment of such loss.

Books of Account and Other Records

In case of loss of, or damage to, Property consisting of books of account or other records used by the Insured in the conduct of its business, the Underwriter shall be liable under this bond only if such books or records are actually reproduced and then for not more than the cost of blank books, blank pages or other materials plus the cost of labor for the actual transcription or copying of data which shall have been furnished by the Insured in order to reproduce such books and other records.

Property other than Securities or Records

In case of loss of, or damage to, any Property other than securities, books of account or other records as aforesaid or damage to the Insured's offices covered under bond, or loss of, or damage to, the furnishings, fixtures, stationery, supplies and equipment therein, the Underwriter shall not be liable for more than the actual cash value of such Property, or of such furnishings, fixtures, stationery, supplies and equipment, or for more than the actual cost of repairing such Property or offices, furnishings, fixtures, stationery, supplies and equipment, or of replacing same with property or material of like quality and value. The Underwriter may, at its election, pay such actual cash value, or make such repairs or replacements. If the Underwriter and the Insured cannot agree upon such cash value or such cost of repairs or replacements, such cash value or such cost shall be determined by arbitration.

SALVAGE

Section 6. If the Insured shall sustain any loss covered by this bond which exceeds the amount of coverage provided by this bond plus the Deductible Amount, if any, applicable to such loss, the Insured shall be entitled to all recoveries made after payment by the Underwriter of loss covered by this bond, except from suretyship, insurance, reinsurance, security and indemnity taken by or for the benefit of the Underwriter, by whomsoever made, less the actual cost of effecting such recoveries, until reimbursed for such excess loss; and any remainder, or, if there be no such excess loss, any such recoveries shall be applied first in reimbursement of the Underwriter and thereafter in reimbursement of the Insured for that part of such loss within such Deductible Amount. The Insured shall execute all necessary papers to secure to the Underwriter the rights herein provided for.

LIMIT OF LIABILITY

Section 7. Payment of loss under this bond shall not reduce the liability of the Underwriter under this bond for other losses whenever sustained; PROVIDED, however, that the total liability of the Underwriter under this bond on account of

- (a) loss caused by any one act of burglary, robbery or hold-up, or attempt thereof, in which no Employee is concerned or implicated, or
- (b) loss with respect to any one unintentional or negligent act or omission on the part of any person (whether one of the Employees or not) resulting in damage to or destruction or misplacement of Property, or
- (c) loss other than those specified in (a) and (b) preceding, caused by all acts or omissions by any person (whether one of the Employees or not) or all acts or omissions in which such person is concerned or implicated, or
- (d) loss other than those specified in (a), (b) and (c) preceding, resulting from any one casualty or event

is limited to the Limit of Liability stated in Item 3 of the Declarations of this bond or amendment thereof or to the amount of the applicable coverage of this bond if such amount be smaller, irrespective of the total amount of such loss.

NON-ACCUMULATION OF LIABILITY

Section 8. Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Underwriter under this bond with respect to any loss specified in the PROVIDED clause of Section 7 of this bond shall not be cumulative in amounts from year to year or from period to period.

LIMIT OF LIABILITY UNDER THIS BOND AND PRIOR INSURANCE

Section 9. With respect to any loss set forth in subsection (c) of the PROVIDED clause of Section 7 of this bond which is recoverable or recovered in whole or in part under any other bonds or policies issued by the Underwriter to the Insured or to any predecessor in interest of the Insured and terminated or canceled or allowed to expire and in which the period for discovery has not expired at the time any such loss thereunder is discovered, the total liability of the Underwriter under this bond and under such other bonds or policies shall not exceed, in the aggregate, the amount carried hereunder on such loss or the amount available to the Insured under such other bonds or policies, as limited by the terms and conditions thereof, for any such loss if the latter amount be the larger.

If the coverage of this bond supersedes in whole or in part the coverage of any other bond or policy of insurance issued by an Insurer other than the Underwriter and terminated, canceled or allowed to expire, the Underwriter, with respect to any loss sustained prior to such termination, cancellation or expiration and discovered within the period permitted under such other bond or policy for the discovery of loss thereunder, shall be liable under this bond only for that part of such loss covered by this bond as is in excess of the amount recoverable or recovered on account of such loss under such other bond or policy, anything to the contrary in such other bond or policy notwithstanding.

OTHER INSURANCE OR INDEMNITY

Section 10. If the Insured carries or holds any other insurance or indemnity covering any loss covered by this bond, the Underwriter shall be liable hereunder only for that part of such loss which is in excess of the amount recoverable or recovered from such other insurance or indemnity. In no event shall the Underwriter be liable for more than the amount of the coverage of this bond applicable to such loss; subject, nevertheless, to Section 7 of this bond.

TERMINATION OR CANCELLATION

Section 11. This bond shall be deemed terminated or canceled as an entirety—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the Insured to terminate or cancel this bond, or (c) immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, or (d) immediately upon the taking over of the Insured by another institution. The Underwriter shall, on request, refund to the Insured the unearned premium, computed pro rata, if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Underwriter, or if terminated or canceled as provided in sub-section (c) or (d) of this paragraph. The Underwriter shall refund to the Insured the unearned premium computed at short rates if this bond be terminated or canceled or reduced by notice from, or at the instance of, the Insured.

This bond shall be deemed terminated or canceled as to any Employee—(a) as soon as the Insured shall learn of any dishonest or fraudulent act on the part of such Employee, without prejudice to the loss of any Property then in transit in the custody of such Employee, or (b) fifteen days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond as to such Employee.

RIGHTS AFTER TERMINATION OR CANCELLATION

Section 12. At any time prior to the termination or cancellation of this bond as an entirety, whether by the Insured or the Underwriter, the Insured may give to the Underwriter notice that it desires under this bond an additional period of twelve months within which to discover loss sustained by the Insured prior to the effective date of such termination or cancellation and shall pay an additional premium therefor. If this bond is terminated or canceled as an entirety by reason of the taking over of the Insured by a receiver or other liquidator or by State or Federal officials, such receiver or other liquidator or State or Federal officials shall have the rights of the Insured and be subject to the same limitations as set forth in this paragraph provided that such rights are exercised by notice to the Underwriter within thirty days after such Insured is taken over by such receiver or other liquidator or State or Federal officials and provided, further, that such Insured has not previously exercised such rights. Upon receipt of such notice from the Insured or from such receiver or other liquidator or State or Federal officials, the Underwriter shall give its written consent thereto; provided, however, that such additional period of time shall terminate forthwith on the effective date of any other insurance.

- (a) obtained by the Insured or its successors in business, other than such receiver or other liquidator or State or Federal officials, replacing in whole or in part the insurance afforded by this bond, whether or not such other insurance provides coverage for loss sustained prior to its effective date, or
- (b) obtained by such receiver, liquidator or State or Federal officials replacing in whole or in part the insurance afforded by this bond but only if such other insurance provides coverage to some extent for loss sustained prior to its effective date, and in the event that such additional period of time is terminated, as herein provided, the Underwriter shall refund any unearned premium.

In witness whereof, the Underwriter has caused this bond to be executed on the Declarations page.

Tab 8

6211 4 12 1984

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

FIRST SECURITY BANK OF UTAH,
N.A.,

Plaintiff,

MEMORANDUM DECISION
AND ORDER

-vs-

AETNA CASUALTY & SURETY
COMPANY,

Civil No: NC-74-23W

Defendant and
Third Party Plaintiff,

-vs-

JOHN GALE and VERL HASLAM,

Third Party Defendants.

On May 31, 1984, the court heard oral argument on all pending motions in this case. First Security Bank of Utah (First Security) was represented by J. Thomas Greene and R. Willis Orton. Aetna Casualty & Surety Company (Aetna) was represented by R. Brent Stephens and Robert H. Henderson. Verl Haslam was represented by M. David Eckersley. John Gale was not represented. Prior to the hearing, the court read the memoranda submitted by the parties in support of and in opposition to the pending motions. At the conclusion of the hearing, the court took the matter under advisement. Since then, the court has

reviewed the parties' memoranda and various of the authorities cited therein. Being now fully advised, the court renders this memorandum decision and order.

Three motions presently are before the court: First Security's motion to strike, its motion for partial summary judgment and Aetna's motion for summary judgment. The motion to strike can be disposed of with little difficulty. The motions for summary judgment, however, focus on issues that theoretically and practically are significantly more challenging. Since the parties have been litigating this matter for ten years, the court will assume that they are thoroughly familiar with the case's factual background. Accordingly, the court will not attempt to present a statement of the facts of the case; but instead, will mention facts only as necessary to its discussion of each motion.

Motion to Strike

First Security has moved to strike Aetna's denial of certain allegations made in the Corrected Second Amended Complaint (the Complaint). First Security also has moved to strike four defenses raised by Aetna in its answer to the Complaint. In response to the motion, Aetna has admitted paragraphs 6, 7, 11 and 22 of the Complaint and has admitted, subject to verification of the supporting documents, paragraphs

28,¹ 33, 34, 35, 36. With respect to paragraph 8 Aetna admits that the stock certificates were marked with a red warning stamp. As to paragraph 9, Aetna admits that Mr. Boyden wrote a letter to Mr. Cowan concerning sale of Ute Distribution Corporation (UDC) stock. Aetna refuses to admit that those two writings state what First Security alleges they state, preferring instead to rely upon the documents themselves. As to paragraph 10, Aetna admits that the branch bank existed, but denies the asserted purpose for its creation. Finally, Aetna persists in its denial of paragraphs 29 and 30.

All paragraphs which Aetna has admitted are accepted as such by the court, as are those parts of paragraphs 8, 9 and 10. The court has before it the documents referred to in paragraphs 8 and 9 and has referred to them as necessary. Finally, the court has examined the documents submitted by First Security in support of its motion relative to paragraphs 29 and 30. In the court's opinion those documents fail to compel the court to find that the

¹ Aetna responded to paragraph 27 of the Complaint, which was not addressed by First Security's motion and failed to respond to paragraph 28, which was covered by the motion. The court assumes that Aetna would admit paragraph 28 on a conditional basis, since it is similar to paragraphs 33 through 36 which Aetna has admitted conditionally.

allegations of paragraphs 29 and 30 are undisputed facts. Accordingly, the motion to strike the denials is denied, but the allegations are admitted or in dispute as noted above.

First Security also has moved to strike Aetna's Third, Fourth, Sixth and Eighth Defenses, which First Security characterizes as "the acquiescence defenses." The thrust of First Security's opposition to those defenses is that to prove that First Security condoned Gale and Haslam's allegedly fraudulent acts, Aetna must prove that First Security's board of directors knew of and appreciated the fraudulent nature of Gale and Haslam's acts. After reading the cases cited by the parties, the court finds that the rule applicable to this situation is set forth in United States Fidelity & Guarantee Co. v. Oklahoma, 383 F.2d 417 (10th Cir. 1967).

An agent's knowledge of matters within the scope of his authority is knowledge of his principal, Knox v. First Security Bank of Utah, 206 F.2d 823 (10th Cir. 1953), for it is presumed that such knowledge will be disclosed to the principal. An exception exists when the transaction is one in which the agent is secretly acting adversely to the principal.

Id. at 419. Thus, First Security may have known of Gale and Haslam's acts without the board of directors having been informed of those acts directly.

In this case, there are at least two sources of knowledge from which First Security could be found to have known of Gale and Haslam's acts. First, Gale and Haslam knew what they were doing and, if acting as agents, First Security would be charged with that knowledge unless Gale and Haslam secretly were acting adversely to First Security's interests. Second, the record contains evidence that Gale and Haslam informed their superiors of some of the things that they were doing. Their superiors, then, also could have had knowledge chargeable to First Security. Whether that knowledge was sufficient to support Aetna's "acquiescence defenses" depends on the resolution of disputed facts, e.g. what Gale and Haslam did, what they told their superiors. Consequently, the motion to strike Aetna's "acquiescence defenses" must be denied.

Motions for Summary Judgment

Aetna's motion for summary judgment is based on essentially two arguments: (1) that First Security failed to comply with the notice provisions and is precluded from recovering on the bond as a consequence; and (2) that Gale and Haslam committed no fraudulent, dishonest or criminal acts and consequently First Security suffered no loss covered by the bond. In contrast, First Security seeks summary judgment in its favor

as to the 208 "remaining plaintiffs."² Aetna's notice argument will be addressed first because of its potentially dispositive impact.

The bankers blanket bond (the bond) under which First Security seeks to recover the losses, attorneys fees and costs incurred in the Reynos, Lefthand and Allen cases contains the following notice of loss provision.

Loss-Notice-Proof-Legal Proceedings
Section 3. At the earliest practicable moment after discovery of any loss hereunder the Insured [First Security] shall give the Underwriter [Aetna] written notice thereof and shall also within six months after such discovery furnish to the Underwriter affirmative proof of loss with full particulars. Legal proceedings for recovery of any loss hereunder shall not be brought prior to the expiration of sixty days after such proof of loss is filed with the Underwriter nor after the expiration of twenty-four months from the discovery of such loss, except that any action or proceeding to recover hereunder on account of any judgment against the Insured in any suit mentioned in the Clause entitled Court Costs and Attorneys' Fees, or to recover attorneys'

² In this lawsuit, First Security seeks to recover its losses, attorneys' fees and costs resulting from three lawsuits filed against it. Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (Reynos); Lefthand v. First Security Bank of Utah, Civil No. 108-67 (D. Utah 1967); Allen v. First Security Bank of Utah, Civil No. 107-68 (D. Utah 1968). Twelve of the Reynos plaintiffs were designated as bellwether cases and they were tried in the Affiliated Ute case. After final judgment was entered against First Security in that case, the Bank settled with the remaining Reynos plaintiffs and the Lefthand and Allen plaintiffs. That group is referred to by the court as "the remaining plaintiffs."

fees paid in any such suit, shall be begun within twenty-four months from the date upon which the judgment in such suit shall become final.

Aetna asserts that First Security "discovered" the loss when the Revos suit was filed in February, 1965. First Security alleges in the Complaint that it orally notified Aetna of the loss in May, 1968 and that it gave Aetna written notice in May, 1972. Corrected Second Amended Complaint ¶¶ 21, 25. Aetna argues that as a matter of law the written notice given in May, 1972 was not at the earliest practicable moment after First Security discovered the loss.

First Security, citing an order entered by Judge Anderson in this case on March 30, 1979, argues that the date final judgment was entered in Revos was the date upon which First Security discovered the loss. Although Judge Anderson construed the notice provision as First Security argues he did, the construction was not material to Judge Anderson's holding in the March 30, 1979 order and as such is dictum. Moreover, as Aetna notes, Judge Anderson in an unreported memorandum decision and order in another case had reversed himself on this issue after initially construing a similar provision in the manner in which he construed it in this case. Mascaro v. Fireman's Fund Insurance Co., (D. Utah filed Jan. 27, 1976). In Mascaro, Judge Anderson relied upon Mt. Vernon Bank & Trust Co. v. Aetna

Casualty & Surety Co., 224 F. Supp. 666 (E.D. Va. 1963), in which the court construed the notice provision used by Aetna in its bankers blanket bonds to mean that the insured discovers a loss when a suit is filed not when called upon to satisfy a judgment. Id. at 670. After reviewing the cases cited by Aetna and reading the terms of the bond carefully, the court is persuaded that Judge Anderson's inclination is correct, but for reasons other than those set forth in the March 30, 1979 order.

The court believes that the Mt. Vernon position is inconsistent with the terms of the bond in two significant respects. First, that position undermines the operation of the sequential procedure established by the bond for processing claims. If the insured discovers the loss when a lawsuit is filed against it, within six months of the filing the insured must provide Aetna with "affirmative proof of loss with full particulars." Assuming the insured contests the lawsuit, the insured will not be able to satisfy that requirement because its loss, the liability on the claim, will not be determined. Thus, adopting the date of filing as the date of discovery puts the insured in the position (in which First Security finds itself in another case presently before this court) of asserting its liability for the underlying claim in one lawsuit while denying it in another.

In contrast, if the date of final judgment is the date of discovery, the insured can provide the proof of loss required by the bond with certainty. Moreover, the bond recognizes the timing problems created by losses occasioned by third-party lawsuits, rather than direct employee fraud, by allowing the insured to initiate a suit against Aetna on such claims up to twenty-four months after final judgment is entered in the underlying suit.

Second, in the case of a loss incurred as the result of a third-party lawsuit against the insured, the bond provides that Aetna will indemnify the insured for the costs and reasonable attorneys' fees incurred by the insured in defending the lawsuit. The bond explicitly provides that as consideration for that additional indemnity "the Insured shall promptly give notice to the Underwriter of the institution of any such suit or legal proceeding. . . . " If the insured is said to discover the loss when the complaint is filed, the insured must give notice to Aetna at the earliest practicable moment following initiation of the lawsuit. The court perceives no distinction between notice "at the earliest practical moment" and notice given "promptly." Thus, construing the provision to equate discovery with the filing of the suit would eliminate the consideration demanded by Aetna to support the additional indemnification for court costs

and attorneys' fees because it would predicate all recovery under the bond on the same consideration. To give both terms of the bond meaning, the court must find that discovery of the loss occurs at some time other than when the legal proceedings are initiated against the insured. The only clearly appropriate point is when final judgment is entered against the insured.

The undisputed facts before the court are that Reynos, Lefthand and Allen were filed in February, 1965, June, 1967 and May, 1968, respectively. In May, 1968, First Security orally notified Aetna of the claims filed in Reynos, Lefthand, and Allen. The United States Supreme Court affirmed the district court's judgment against First Security, Gale and Haslam on the twelve bellwether claims in April, 1972. Final judgment on the twelve bellwether claims was entered on June 26, 1972. First Security notified Aetna of the Reynos, Lefthand and Allen claims by letter of May 3, 1972 and Aetna denied liability on May 22, 1972. First Security settled the remaining Reynos claims, the Lefthand claims and the Allen claims on May 2, 1973, January 29, 1974 and January 24, 1974, respectively.

Those facts demonstrate that First Security gave written notice to Aetna shortly after the Supreme Court decided the twelve bellwether claims, albeit before final judgment was

entered on those claims. In addition, First Security gave Aetna written notice of the remaining claims prior to settling those claims. In the court's opinion, the written notice of May 3, 1972 satisfies the notice requirements of the bond.

The undisputed facts also demonstrate that First Security did not give Aetna any notice of the filing of Reynos for more than three years and of Lefthand for nearly one year. First Security has advanced no justification for that delay. The bond requires the insured to give Aetna prompt notice of the filing of such suits in consideration for Aetna's promise to indemnify the insured for court costs and reasonable attorneys' fees. In the court's opinion, First Security's failure to notify Aetna of the Reynos and Lefthand suits promptly precludes First Security from recovering any court costs or attorneys' fees incurred in defending those cases. First Security notified Aetna of the filing of Allen within a month of the complaint being filed. Thus, as to Allen First Security gave Aetna prompt notice of the initiation of the lawsuit and it may pursue its court costs and attorneys' fees claim against Aetna on the Allen case.

Since Aetna denied liability for the losses suffered by First Security as a result of the Reynos, Lefthand and Allen cases on grounds other than the failure to comply with the proof of loss requirement, Aetna is precluded from raising the proof of

loss requirement as a bar to First Security's claims under the bond. Stewart v. Commerce Ins. Co., 114 Utah 278, 198 P.2d 467 (1948). The undisputed facts demonstrate that this lawsuit was filed on April 19, 1974, less than twenty-four months after the final judgment was entered on the Revos bellwether claims. Consequently, the court must conclude that First Security is not barred by the notice, proof of loss or filing requirements of the bond from pursuing its claims, except for the court costs and attorneys' fees claims on Revos and Lefthand, against Aetna.

Aetna also contends that the facts produced by discovery demonstrate that First Security is unable to satisfy the burden of proving that the loss it suffered is covered by the bond. In his March 30, 1979 order, Judge Anderson stated First Security's burden of proof in this case.

In short, the only method by which the Bank can recover what it prays for in this case is to plead and prove, as to each UDC stock transaction of each of 208 plaintiffs, that Gale and/or Haslam committed a dishonest, fraudulent, or criminal act with consciousness of wrongdoing, that such acts were within the scope of their usual duties, and that such acts resulted in loss to the Bank.

Order Dismissing Complaint with Leave To Amend at 12 (filed March 30, 1979) (footnote omitted). Through discovery, Aetna has identified three groups of transactions from which the underlying lawsuits arose: those as to which there is no

evidence that Gale or Haslam was involved in any manner; those as to which the evidence indicates that Gale or Haslam only witnessed, guaranteed or notarized the seller's signature; and those as to which the evidence indicates that Gale or Haslam purchased shares for their own account or received commissions as a result of the sale. Aetna argues that summary judgment must be granted as to the first two groups because the facts demonstrate that Gale and Haslam did not commit a dishonest, fraudulent, or criminal act as to those two groups. Aetna seeks summary judgment as to the third group, arguing that First Security knew of and condoned Gale and Haslam's actions.

As discussed more fully above, the court believes that the record contains questions of fact material to the determination of what First Security knew of Gale and Haslam's actions. As to the third group, Aetna's motion for summary judgment must be denied.

First Security opposes Aetna's motion by advancing a fraud on the market theory through which it argues it may prove that every plaintiff in Reynos, Lefthand or Allen who sold UDC shares was injured because Gale and Haslam's acts tainted the market for UDC shares. The fraud on the market theory generally is recognized in the context of established stock markets. The assumption underlying the theory is that traders rely upon the

operation of the market to interpret all available information concerning a particular stock in establishing a market price for the stock. If a person withholds pertinent information from or distributes inaccurate information to the market, the market price will be distorted and traders will be injured. T. J. Raney & Sons, Inc. v. Fort Cobb, Oklahoma Irrigation Fuel Authority, 717 F.2d 1330, 1332 (10th Cir. 1983). In short, the fraud on the market theory permits a plaintiff to establish the causation element of a securities case by proving that "fraudulent statements [or omissions] so permeated and polluted the market as to distort the market price by distorting the decisionmaking process by which others determined to sell." Schlanger v. Four-Phase Systems, Inc., 555 F. Supp. 535, 538 (S.D.N.Y. 1982).

Aetna contends that the fraud on the market theory has no application to sellers. The court perceives no reason for limiting the theory's application to buyers and the Schlanger court held that a class of sellers could rely on the fraud on the market theory to establish their claims. 555 F. Supp. at 538-39.

The court is persuaded that First Security need not prove that Gale or Haslam was involved personally in each UDC stock transaction involved in the Reynos, Lefthand and Allen cases; but instead, may rely upon the fraud on the market theory

to satisfy its burden of proving that each such transaction was affected by a dishonest, fraudulent or criminal act of Gale or Haslam. To establish the fraud on the market theory, First Security must prove that a market existed, including proof of the bounds of that market; that Gale or Haslam intentionally and knowingly and with the intent to defraud made untrue statements of material fact or omitted to state a material fact necessary to make the statements, in the light of the circumstances in which they were made, not misleading; that those acts of Gale or Haslam so permeated and polluted the market as to distort the market price; and that the transaction occurred while the market price was distorted. T. J. Raney & Sons, 717 F.2d at 1332; Schlanger, 555 F. Supp. at 538-39. The court finds that the record contains genuine issues of material fact concerning various elements of the fraud on the market theory which preclude it from granting Aetna's motion for summary judgment as to any of the three groups of transactions.

First Security has moved for summary judgment against Aetna on the claims of the "remaining plaintiffs" based on its assertion that Aetna's failure to undertake the defense of those claims after First Security tendered the defense to Aetna creates a presumption that the claims of the "remaining plaintiffs" against Gale and Haslam have been established in those cases.

HS Equities, Inc. v. Hartford Accident & Indemnity Co., 609 F.2d 669 (2d Cir. 1979). First Security contends that Aetna has failed to discover any evidence that rebuts that presumption.

The court, however, disagrees. The questions of fact raised by the "acquiescence defenses" advanced by Aetna alone preclude the court from granting summary judgment based on the presumption recognized by the HS Equities court. In addition, the court does not believe that the presumption is applicable in this case. The rationale which supports the presumption is that the insurer had an opportunity to defend against the underlying claims, and having declined to accept that opportunity must bear the burden of contesting the allegations of the underlying causes of action. Id. at 674. In this case, the parties to the underlying lawsuits selected twelve bellwether plaintiffs to test the plaintiffs' theories. The Affiliated Ute decision was based on the bellwether plaintiffs' facts and law, but First Security, implicitly at least, recognized the precedential value of that decision with regard to the "remaining plaintiffs'" claims. Corrected Second Amended Complaint ¶ 32. The undisputed facts demonstrate that Aetna was not given the opportunity to defend the bellwether claims. Since the result of that litigation prompted First Security to settle the remaining claims, Aetna did

not have a meaningful opportunity to defend against the underlying claims. Consequently, the court believes that it would be inappropriate to presume that the claims of the "remaining plaintiffs" were established against Gale and Haslam. Accordingly, First Security's motion for partial summary judgment must be denied.

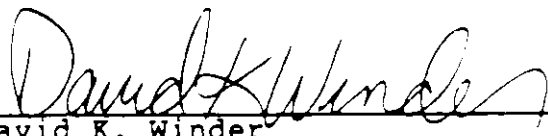
Accordingly,

IT IS HEREBY ORDERED:

1. That First Security's motion to strike be denied.
2. That First Security's motion for partial summary judgment be denied.
3. That Aetna's motion for summary judgment be denied.

This Memorandum Decision and Order shall suffice as the court's action on these motions and counsel need prepare no other order.

Dated this 11th day of July, 1984.



David K. Winder
United States District Judge


Mailed a copy of the foregoing to the following named
counsel this 11 day of July, 1984.

J. Thomas Greene, Esq.
R. Willis Orton, Esq.
800 Kennecott Building
Salt Lake City, Utah 84133

Harold G. Christensen, Esq.
R. Brent Stephens, Esq.
Robert H. Henderson, Esq.
P. O. Box 3000
Salt Lake City, Utah 84110

M. David Eckersley, Esq.
419 Boston Building
Salt Lake City, Utah 84111

James R. Hall, Esq.
51 North First East
Roosevelt, Utah 84066


Secretary